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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 639

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,

Petitioner,

v.

UNITED STATES OF AMERICA,
STEWART L. UDALL, Secretary of the Interior, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Washington Metropolitan Area Transit Commission, petitioner, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit which was entered on June 12, 1968.

OPINIONS BELOW

The opinion of the District Court is reported at 268 F.Supp. 34, and is set forth in the Appendix hereto, pp. 26-59, and the order of the Court of Appeals reversing the

order of the District Court is set forth in the Appendix, pp. 17-25.

JURISDICTION

The order of the Court of Appeals was entered on June 12, 1968. A petition for rehearing *en banc* was denied on August 5, 1968; two judges would have granted rehearing, four judges declined rehearing, and two judges did not participate. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Are regulations of the Secretary of the Interior unlawful when they employ the double standard of (a) prohibiting one bus carrier from operating at all on a public road, (b) permitting another carrier to operate 52 daily trips, but restricted as to their use *after* they leave that road, and (c) allow others to operate more than 800 daily trips on an unrestricted basis, when all of the buses have identical physical characteristics and perform an identical service?

II

May the Court of Appeals reverse a District Court's decision that the evidence does not show a rational basis for discriminatory regulations, when that reversal is predicated and bottomed on evidence outside the trial record?

III

May an appeals court base its decision on "opinion" evidence never adduced at the trial?

IV

When the Secretary of Interior is authorized by law to establish regulations necessary or proper for the use and management of a Parkway under his jurisdiction, and he promulgates a regulation authorizing a carrier to use that Parkway enroute to an area off of the Parkway for a stated

purpose, does he exceed his authority when he also attempts to control the use of the carrier's vehicles *after* it has fulfilled that purpose?

STATUTES INVOLVED

The primary statute provisions involved are:

Act of August 25, 1916 (39 Stat. 535 as amended, 16 U.S.C. §§ 1, 3).

The primary regulatory statute provisions promulgated by the Secretary of the Interior which are involved herein are:

36 C.F.R. § 50.36(b)(3)(i).

STATEMENT OF THE CASE

A highway runs along the Virginia side of the Potomac River from the Beltway on the north to Mt. Vernon on the south. This road, the George Washington Memorial Parkway (Parkway), is owned by the United States and under the control of the Secretary of the Interior (Secretary). Regulations governing the use of the Parkway have been promulgated by the Secretary, including its use by buses.

The scope of these regulations may be briefly summarized. South of Memorial Bridge the road is open for use by all types of buses—commuter buses, sightseeing buses, airport buses, charter buses; of just the commuter buses, there are more than 800 daily trips. North of Key Bridge the Secretary's regulations permit unlimited use of the road by airport buses and sightseeing buses. However, severe restrictions are placed on its use by commuter buses. The W. V. & M. Coach Company is permitted to run commuter service to the CIA Building and return directly, but they may not go beyond the CIA Building to serve Virginia suburb areas. These buses load in the District of Columbia, then enter the Parkway. There is no pickup or discharge of passengers on the Parkway. The buses leave the Parkway and enter the CIA grounds. After this service was established, the W. V. & M. Coach Company received addi-

tional certification from the Transit Commission to extend the service from the CIA to serve points in the suburban northern Virginia areas. D.C. Transit System, Inc., also received certification from the Transit Commission to transport passengers from Maryland and the northwest portion of the District of Columbia over the Beltway and the northern portion of the Parkway to the CIA. However, the Secretary's regulations prohibit any commuter service on the Parkway between the CIA and the Beltway. On the other hand, about 200 airport and sightseeing buses use all portions of the northern part of the Parkway daily under the Secretary's regulations.

This action arose below in May, 1963, when the United States sought to block the commuter service *beyond* CIA as being in violation of its regulations. W. V. & M. Coach Company brought a counteraction. D. C. Transit System, Inc., the Transit Commission, and the state Corporation Commission of Virginia became parties to this consolidated action either as parties-defendants or by intervention.

Early in the litigation, the United States filed a motion for summary judgment. That motion was denied February 28, 1964.

Trial commenced in November, 1966. On April 13, 1967, the Trial Court, Judge Sirica, entered its opinion, together with its "Findings of Fact" and "Conclusions of Law." A final order was filed June 9, 1968.

The District Court stated that all parties were in accord with the legal principles[1] by which the case was to be resolved. In essence, the regulations could be declared invalid only if they lacked "a rational basis," were arbitrary or beyond the Secretary's authority. The Trial Court thus posed and answered the issue:

> In view of the broad discretion vested in the Secretary and the Park Service, and in view of the limited role of the reviewing Court, does the evidence show a rational basis for the regulations here in issue? I

---

[1]Acknowledged by the Court of Appeals to be correct.

> conclude that the evidence does not show a rational basis for the regulations as they now exist. (App. p. 40)

In its opinion, the Trial Court noted that certain affidavits of the Secretary and others had been filed in support of the government's motion for summary judgment. After reciting the denial of the motion, the court went on to state that "[s]ince the affidavit of the Secretary was not introduced into evidence, it cannot be considered by the Court."

After reciting the contentions of the Secretary, the Trial Court rejected them, stating that they are "clearly wrong" and that the weaknesses of the argument are "so manifest that the Court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the Act of Congress." (App. p. 42.)

Again, at page 43, the court said that the Secretary's

> "theories do not have substantial evidence in the record to support them and they do not provide a rational basis for the unfair and discriminatory double standard regulations which presently apply to the suburban buses using the Parkway. These, nevertheless, are the contentions advanced by the government and I have no alternative but to invalidate this regulatory pattern in the absence of a rational basis in the evidence of record."

The District Court opinion was reversed by a panel of the United States Court of Appeals for the District of Columbia Circuit, by a split decision, Judge Tamm dissenting.

Relying almost exclusively upon the opinions set forth in the affidavit of the Secretary, the Court of Appeals felt that "the Secretary's discrimination in the use of the Parkway has a rational basis in the record" for the regulations. Judge Tamm, in dissenting, stated that he concurred in the District Court's finding that the regulations lacked a rational basis, for "it is inconceivable to me that the Secretary is able to justify as reasonable and authorized in law, his action in permitting two other bus operators to route identically

constructed buses over the Parkway while refusing to permit a third operator, *id est*, [W. V. & M.] Coach Company also to operate thereupon."

A petition for rehearing *en banc* was declined; two judges stated that they would grant the petition, four judges voted to deny the petition for rehearing, and two judges did not participate.

REASONS FOR GRANTING THE WRIT

The petitioner here is a regulatory agency charged by law with protecting the public interest in the field of public transportation in the Washington Metropolitan Area. Its role in the proceedings below was to protect the public's interest in conflict between the proprietor and a user of a public highway.

Our expressed position was that certain regulations of the Secretary of the Interior were not only contrary to the public's interest, they had no rational basis behind them and were so discriminatory that they were clearly arbitrary and capricious. Sustaining the regulations will deprive hundreds of people of an adequate means of public transportation.

When the regulations were challenged, the District Court invalidated them in a painstaking and illuminating opinion.

As will be shown, there is a "very obvious and exceptional showing of error" upon the part of the Court of Appeals. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S. Ct. 535 (1949). We submit that the action of the Court of Appeals was so contrary to both the facts and the law—and so damaging to the interest of a large segment of the public—that it must be reversed. In fact, its decision is so unfair and erroneous that this Court should not only reverse, it should summarily affirm the order of the District Court.

I

THERE IS NO "REASONABLE BASIS" FOR ADMITTED DISCRIMINATION

It seems patently arbitrary to impose the artificial restriction embodied in the Secretary's regulation. The very notion that buses are somehow more objectionable than automobiles on such a road is highly questionable. The modern bus is an attractive vehicle; it moves at high speed along with other traffic; its noise and fumes, particularly at highway speeds, are no worse than that of automobiles. Moreover, there are positive benefits which flow from bus usage of the highway in question. More detrimental to enjoyment of the scenic values of this road than the appearance of buses is the congestion of the roadway by commuter traffic. Each loaded bus can reduce the number of automobiles on the road by fifty or more and add significantly to enjoyment of the road by all.

Even if it were true that buses are somehow esthetically less desirable than cars, the Secretary's action would still be completely unreasonable. He has not kept all buses off the roadway. He permits airport and sightseeing service, in vehicles substantially identical to those used for commuter runs. Somehow, though, the commuter buses are objectionable while the others are not. Indeed, he even permits commuter runs provided they end at CIA. *Hence, the 52 commuter buses now using the Parkway will continue to do so if the regulation is upheld.* The only difference will be that they must terminate at CIA instead of going beyond that point on other roads to provide better service for Virginia commuters. Thus, the Secretary's regulation will not even have any significant impact on the actual bus usage of the Parkway. It will only diminish the quality of service beyond CIA. This can only be regarded as patently capricious. Moreover, it exceeds his statutory authority.

The Secretary's position, moreover, ignores a fact which is known and obvious to everyone familiar with this area.

The Parkway north of Key Bridge is not simply a scenic highway for the enjoyment of sightseers.[2] Anyone who travels it during the peak hours for travel between home and work is forcibly made aware that it is a major corridor for commuters[3] in this area. There is no justification whatever for discriminating against use of the highway by bus users. The mass transit rider is entitled to the same consideration and facilities as the automobile driver. This is a clear case of a denial of the use of public property to one class of citizens as opposed to another, *Sproles v. Binford,* 286 U.S. 374, 52 S. Ct. 581 (1932).

The court of appeals stated that there was more to the Secretary's "rational basis" than just his conclusion that the buses were unsightly: "'. . . the compelling necessity to provide CIA employees swift and immediate access to their Agency'" requires "that direct commercial transportation to the CIA Building should be permitted on the Parkway." (App. p. 22.) On December 12, 1962, D. C. Transit was refused a permit to carry CIA employees over the Parkway to the CIA, despite a Transit Commission finding that "the Parkway offers the most direct and shortest route, the fastest and more efficient service, and just as important, the safest route." This can only be "arbitrary bureaucracy masquerading as reasoned judgment.[4] Once again we find a crass example of a "double standard"; again, we find the reasoning of the Secretary being applied to one person and withheld from another.

A further illustration of the arbitrary nature of the regulations in question is the different treatment accorded the Parkway section below Memorial Bridge. There, full usage by commuter buses is allowed. Yet, as the trial judge found, that section is fully as scenic, if not more so, than the section above Key Bridge.

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[2]A finding of the Trial Court (App. p. 43).

[3]For graphic proof, see W.V. & M. Exhibits Nos. 37 and 38, motion pictures of the rush hour traffic on the Parkway.

[4]Judge Tamm, dissenting in court of appeals decision.

The Commission is itself an independent agency whose decisions are subject to judicial review. We would be the last to suggest that the exercise of administrative discretion be lightly overturned by the courts. Occasions do arise, however, when an administrator falls into error and renders an arbitrary and capricious decision. This is patently one of those situations. The Secretary's attempt to bar a limited group of commuters from the use of the Parkway is discriminatory, capricious, and contrary to sound public policy. The distinctions he draws against buses in general, and against a certain limited class of commuter buses in particular, are indefensible.

This is not to say that the Secretary is powerless to protect his highway from excessive burdens or to maintain it in a safe and good condition. There are ways and means to regulate the use of the highway by buses. The regulations employed here are, however, a denial of the use of the road by one member of a class, while other members of that class are permitted an unrestricted use. This Court in *Sproles v. Binford*, 286 U.S. 374, 52 S. Ct. 581, indicated such arbitrary discrimination could not stand.

The limitation of the regulation has "no appropriate relation to highway protection." *Sproles v. Binford*, 286 U.S. at 394, 52 S. Ct. at 587. The regulations do not limit or even attempt to define the number of trips the carrier may operate over the Parkway to the CIA, which is not on the property administered by the Secretary. Hence, under the regulations, the carrier could double the number of daily trips operated between the District of Columbia and the CIA.

Nevertheless, the Secretary insists that the vehicles must turn around at the CIA and return directly to the District of Columbia.

Why does he insist upon this? The record, even if it included his affidavit, is completely barren of any fact which might supply an answer.

II

THE COURT OF APPEALS' DECISION NOT ONLY IGNORES THE ACTUAL EVIDENCE, IT IS FORMULATED ON A DOCUMENT NOT IN EVIDENCE

The Trial Court recognized that the parties were not at issue over matters of law. The trial court stated, "What the issue comes down to is this: In view of the broad discretion vested in the Secretary and the Park Service, and in view of the limited role of the reviewing Court, does the *evidence* show a rational basis for the regulations. . .?" (App. p. 40) (Emphasis supplied)

A. Evidence Not in the Record

The trial court then reviewed the evidence to support the two concepts argued by the Government as the "rationale" or "rational basis" of the regulations. The trial court found that the "scenic value" and "old highway-new parkway" theories ". . . *do not have substantial evidence in the record to support them*. . . ." (Emphasis added)

Significantly, the Court of Appeals, in reversing these evidentiary findings, relies not on the evidence adduced during the trial, but falls back upon the depths of the pretrial pleadings for an affidavit attached to a motion—a motion denied almost two years prior to the trial. Despite the express finding[5] by the trial judge that the affidavit of Secretary Udall "was not introduced into evidence" and "it cannot be considered by this Court," the majority decision of the Court of Appeals initiates *its* discussion of the case by declaring that the "Secretary explained his reasons for the regulations in an affidavit. . . ." (App. p. 21.) That the document is the very crux of the Court of Appeals' opinion is glaringly apparent, for repeatedly the court refers to or quotes from it. (App. pp. 21-22.)

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[5]This finding was not challenged by the United States in its appeal to the District of Columbia Circuit Court.

Uncontradicted evidence strongly supports District Judge Sirica's findings. The United States simply failed to make out a case for sustaining the Secretary's regulations. This failure was not due to lack of opportunity to present evidence, including the calling of the Secretary to the stand.

The essential predicate for upholding the regulations is the Secretary's affidavit. The non-evidentiary status of that document, seemingly a condition precedent to its use, the court of appeals avoids. It simply assumes, without overruling the District Court, that the affidavit was part of the trial record.

In *Federal Trade Commission v. Universal-Rundle*, this Court, in setting aside a Court of Appeals' decision on other grounds, stated that it was improper for the lower court to reach questions raised by "post-proceeding" evidence. 387 U.S. 244 at 252 (n.5), 87 S. Ct. 1622, at 1627.

The logic of this rule applies equally as well to pretrial affidavits, especially where attached to motions which are denied before trial.

Fundamental concepts of fairness preclude reliance upon such untested documents. The petitioner had absolutely no chance to "test" the statements—which were mainly opinion—contained in the affidavit. In short, we have been denied the most basic concept of due process of law.

B. Improper Review

The standards by which the Court of Appeals conducted its review are not articulated in its opinion. While the opinion is silent as to the standards employed, it is readily apparent that certain standards were not used.[6] For exam-

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[6] "Findings of fact by the trial judge are presumptively correct and are to be accepted by reviewing courts unless clearly wrong." *Butte and Superior Copper Co. v. Clark Montana Realty Co.*, 249 U.S. 12, 30, 39 S.Ct. 231, 236; *Baker v. Schofield*, 243 U.S. 114, 118, 37 S.Ct. 333, 334; *District of Columbia v. Pace*, 320 U.S. 698, 64 S.Ct. 406.

ple, the Court of Appeals does not say that the lower court's findings lack substantial evidence or are "clearly erroneous."[7] Surprisingly, it does not even discuss the evidentiary status of the Secretary's affidavit.

The inescapable conclusion to be drawn from the Court of Appeals' opinion is simply that the court tried the case *de novo*, relying almost exclusively on the unsupported opinions of the Secretary, as well as its own speculations.

For example, the Secretary is quoted as finding W. V. & M. buses to be unsightly and hence, aesthetically objectionable. Yet the trial court *found* that "the government has not proved that suburban commuter buses have any adverse effect upon scenic aspects of the Parkway at the time of day when such buses would be using it." (App. p. 37.)

The "scenic value" theory cannot be sustained in the face of the evidence, the Government admitted below that the southern part of the Parkway "is a scenic attraction which equals and perhaps surpasses the newer section above Key Bridge." Nevertheless, the majority blandly asserted that "aesthetic reasons" justify the double standards imposed by the Secretary, without commenting on the finding of the trial judge that his search of the facts for a rational basis revealed the contrary. The Court of Appeals declares that "252 buses are more unsightly and objectionable than 200."[8] No one so testified. Upon what evidence does the majority form this conclusion? Following the rationale of the majority, it would have been more logical for the Secretary to permit the 52 commuter trips and eliminate the 200 sightseeing, government, and airport trips.

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[7]"Findings of fact shall not be set aside unless clearly erroneous. . . ." Fed. Rules Civil Procedure, Rule 52(a), 28 U.S.C.A.

[8]In holding to the contrary, the trial court had before it actual pictures of the bumper-to-bumper, rush-hour traffic on the Parkway. It would be interesting to hear any *expert* witness attempt to substantiate this statement. Moreover, enforcement of the regulation would not eliminate the 52 W.V. & M. commuter trips; see discussion of this point, supra, p. 11.

The Court of Appeals then compounds its error by completely unfettering its imagination: "But even more important, the 52 trips . . . might well become several hundred. . . ." (App. p. 24.) This is pure conjecture, for there is no evidence to support this "straw man" the majority so vigorously attacks.

But assume, for the moment, that the conjecture had some substance to it. How does it vitiate the trial court's decision? Who would benefit from it? The Secretary allows over *800* commuter trips daily on the southern portion of the Parkway without, presumably, detracting from its equally scenic attraction. Moreover, additional trips would only enhance the quality of service available to CIA employees. The more one examines the "rational basis" of the Secretary, the less rational it becomes. And the more penetrating the analysis, the more apparent the "*de novo*" review of the reviewing court becomes.

Perhaps in recognition of the weakness of this argument, the Court of Appeals then stated that the Secretary "did not find that only W. V. & M. buses were unsightly," but that it was a "compelling necessity to provide CIA employees swift and immediate access to their Agency." (App. p. 22.) If this is so, upon what rational basis did the Secretary refuse D. C. Transit a permit to transport CIA employees over the Parkway to the Agency? The buses are identical; the class of passengers are the same; both services have alternate, but longer routes. This persistence in establishing double standards must be stopped; these flagrant discriminations compel this Court to take corrective action. Moreover, the Court should consider the novel concept of judicial review espoused by the Court of Appeals' decision, wherein a lower court is reversed simply because the appellate court does not agree with his interpretation of the evidence. The law cited by the reviewing court to govern the trial court in reviewing administrative action is reflective of an equally stringent standard of review by the appellate court. A *de novo* determination of the case based on evidence outside the trial

record simply does not comport with acceptable standards of judicial review.

III

THE COURT OF APPEALS FAILED TO CONSIDER WHETHER THE SECRETARY EXCEEDED HIS AUTHORITY

It was discussed earlier in this pleading that the transportation authorized by the Secretary began and ended off of the Parkway. The amazing thing about this controversy is that the Secretary is attempting to control the transportation after the vehicles leave the Parkway. And this, we submit, exceeds the scope of his statutory authority.

Congress has directed the Secretary of the Interior and the National Park Service to

> "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (16 U.S.C. § 1.)

That Act also authorizes the Secretary to make "such rules and regulations" as are necessary for the use and management of those lands and parks. 16 U.S.C. § 3.

Claiming to act on the basis of the Congressional directive, the Secretary adopted certain regulations relating to the operation of commercial vehicles on the Parkway. As pertinent here, the regulations provided:

> "Section 3.36 is amended to read as follows:
>
> (b) *George Washington Memorial Parkway; passenger-carrying vehicles; permits, fees.* . . .
>
> (3) Passenger-carrying vehicles for hire or compensation, other than those to which subparagraphs (1)

> and (2) of this paragraph apply, may be permitted on the George Washington Memorial Parkway upon application for, and the granting of a permit by the Regional Director, National Capital Region, National Park Service under the following conditions:
>
> (i) When operating on a regular schedule (a) to provide passenger service on any portion between Mount Vernon and the Arlington Memorial Bridge, (b) to provide limited direct nonstop passenger service from Key Bridge to a terminus at the Central Intelligence Agency Building at Langley, Virginia, *and direct return*, and (c) to provide limited direct nonstop passenger service from the interchange at Route 123 to a terminus at the Central Intelligence Agency Building at Langley, Virginia, *and direct return*. (Emphasis supplied)

Once the Secretary allows the vehicle to be used on the Parkway, how does its subsequent use affect his statutory obligation to provide for the proper use and management of that public road? What difference does it make if, of ten passengers, eight are destined to the CIA and two are destined beyond? Will enforcement of the regulation reduce the number of commuter trips and still permit adequate service to the CIA? If it is important for CIA employees[9] to have "swift and immediate access to their agency," is it not equally important for the residents of northern Virginia to have a corresponding service? Or the residents of the District of Columbia who work in the Virginia suburbs? The answers to these questions should have been supplied by the United States, in order to correlate the restriction with the statutory authority. The United States simply did not meet the burden of proof, and the Court of Appeals misconstrued the function of judicial review when it proceeded nonetheless to speculate upon what might have motivated the Secretary. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, at 35, 87 S. Ct. 1792, at 1798 (1967).

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[9]The regulations do not restrict the service to employees; hence, the most casual visitor may be served.

In what manner restricting the use of the vehicle after it leaves the Parkway aids the Secretary in conserving the scenery or wild life has not been exposed in *this* record. On its face, the regulation appears to be "plainly and palpably inconsistent with the law," *Boski v. Comingore*, 177 U.S. 459, 470, 20 S. Ct. 701, 706 (1900), and should be invalidated.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed and the opinion and order of the District Court affirmed.

Respectfully submitted,

RUSSELL W. CUNNINGHAM
Attorney for Petitioner

October 8, 1968

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,394

STEWART L. UDALL, Secretary of the Interior, *et al.*,
Appellants

v.

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, INC.,
Appellee

D. C. TRANSIT SYSTEM, INC., Intervenor

No. 21,395

UNITED STATES OF AMERICA, Appellant

v.

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, INC.,
Appellee

D. C. TRANSIT SYSTEM, INC., WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, and VIRGINIA STATE CORPORATION COMMISSION, Intervenors

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Appeals from the United States District Court
for the District of Columbia

Decided June 12, 1968

Mr. A. Donald Mileur, Attorney, Department of Justice, with whom *Assistant Attorney General Martz*, *Acting Assistant Attorney General Harrison*, and *Messrs. Roger P. Marquis* and *Thos. L. McKevitt*, Attorneys, Department of Justice, were on the brief, for appellants. *Mr. J. Edward Williams*, Attorney, Department of Justice, also entered an appearance for appellants.

Mr. Manuel J. Davis for appellee and for intervenor D. C. Transit System, Inc.

Mr. Russell W. Cunningham, with whom *Mr. Renn C. Fowler* was on the brief, for intervenors Washington Metropolitan Area Transit Commission and Virginia State Corporation Commission.

Messrs. Wilmer S. Schantz, Jr. and *Samuel M. Langerman* were on the brief for intervenor D. C. Transit System, Inc.

Before PRETTYMAN, *Senior Circuit Judge*, and WRIGHT and TAMM, *Circuit Judges*.

WRIGHT, *Circuit Judge*: The facts of this appeal can be quickly stated. The United States owns and controls a strip of land which runs along the Potomac River on the Virginia side. Located on this strip is a multi-lane highway, known as the George Washington Memorial Parkway, which stretches from Mount Vernon at its southern end through the city of Alexandria, north through Arlington and Fairfax Counties, past Memorial and Key Bridges, to its northern end at the intersection of the Capital Beltway, Route 495. The Parkway is administered by the National Park Service of the Department of the Interior, whose Secretary has been charged by Congress to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments and reservations under the jurisdiction of the National Park Service * * *."[1]

Pursuant to this authority the Secretary has issued a series of regulations relating to the operation of commercial vehicles and common carriers on the George Washington Memorial Parkway. The regulations relevant to this appeal provide that passenger carrying vehicles for hire or compensation, other than licensed taxicabs and airport transport ve-

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[1] Act of August 25, 1916, § 3, 16 U.S.C. § 3 (1964 ed.).

hicles carrying fewer than 14 passengers, are permitted to use the Parkway only with a permit from the Regional Director of the Park Service and only under certain conditions. In essence, permits are granted for unlimited commercial bus service south of Memorial Bridge and, because of the condition of the road surface, no bus service is permitted from Memorial Bridge north to Key Bridge. North of Key Bridge sightseeing buses are allowed pursuant to a permit, as are buses operating nonstop to and from Dulles International and National Airports. But the Secretary's regulations forbid regular commuter bus service over the northern sector of the Parkway except for "direct nonstop passenger service from Key Bridge to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return, and (*c*) to provide limited direct nonstop passenger service from the interchange at Route 123 to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return."[2]

In 1961 Washington, Virginia and Maryland Coach Company, the appellee, obtained a permit from the Park Service to run its buses on the northern sector of the Parkway in a manner consistent with the Secretary's regulations. Then, apparently in 1962, it came to the attention of the Park Service that WV&M was not obeying the regulations in that, after making their runs to the CIA Building, its buses were continuing on into northern Virginia, collecting and discharging passengers, and then returning to the Parkway for the return trip south. This procedure violated its permit, which authorized only nonstop trips to the CIA Building and *direct return.*

After negotiation with WV&M, its permit was reissued with this requirement of direct return made even more explicit. Nevertheless, WV&M has consistently denied the validity of the regulations and has continued to violate their

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[2]36 C.F.R. § 50.36(b)(3)(i) (Supp. 1968).

terms. Consequently the United States brought suit to restrain WV&M from continuing its unauthorized operation of a suburban commuter bus service on the Parkway between Key Bridge and the CIA Building. D. C. Transit System, Inc., the parent corporation of WV&M, and the Washington Metropolitan Area Transit Commission[3] intervened as defendants. In answer to the suit, WV&M denied the validity of the regulations and counterclaimed for a return of fees paid to the Park Service. In a separate action in which D. C. Transit and WMATC joined as plaintiffs, it sued the Secretary of the Interior to challenge the validity of his regulations.

After the consolidation and trial of these cases the District Court ruled that WV&M was not entitled to refund of the $2,284 in fees which it had paid up to the time of trial to use the Parkway. It also denied the claim of the United States for injunctive and declaratory relief, ruling that the Secretary's regulations were "unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, insofar as they do not permit suburban commuter buses owned by W. V. & M. * * * to operate without limitation on the Parkway

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[3]The WMATC has authorized the WV&M bus service which the Secretary of the Interior has sought to curtail. But WMATC's argument as intervenor is only that the Secretary's regulations are unreasonable. The Commission has not urged that its authority overrides that of the Secretary. The trial court addressed itself to the issue of the relationship between the Commission and the Secretary, holding:

> "The Act of September 15, 1960 (74 Stat. 1031, 1037), creating the Washington Metropolitan Area Transit Commission (the WMATC) with authority to issue certificates of public convenience and necessity * * * in the Washington Metropolitan District, did not revoke by implication or supersede the authority of the Secretary of the Interior to promulgate reasonable regulations with respect to administration and use of the George Washington Memorial Parkway." *United States* v. *Washington, Virginia & Maryland Coach Co.*, D. D.C., 268 F.Supp. 34, 50-51 (1967).

This conclusion of law has not been challenged on appeal and is not now before this court.

above the Key Bridge * * *." 268 F.Supp. at 51. We affirm this decison with respect to the validity of the fees exacted, but reverse the denial of injunctive and declaratory relief.

In essence the trial judge felt that the regulations were discriminatory and invalid for two reasons: first, because they unreasonably allow unlimited bus service south of Memorial Bridge while limiting such service north of the Bridge[4]; and second, because they allow sightseeing, airport and CIA Building buses north of Key Bridge while prohibiting general commuter service on this section of the Parkway.

The Secretary explained his reasons for the regulations in an affidavit in support of the United States' motion for summary judgment. He felt that the use of the Parkway by "ever increasing numbers of commuter busses with their great bulk, trucklike characteristics, and odors, as is contemplated by the Washington, Virginia & Maryland Coach Company, would, in my opinion, physically damage the scenic value of the Parkway."

The trial judge, however, concluded that the Secretary's regulations were not reasonably related to his goal of preserving the scenic value of the Parkway. For he felt that the southern sector of the Parkway was more scenic than the northern sector[5] and consequently to allow unlimited

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[4]Below Memorial Bridge the Alexandria, Barcroft and Washington Transit Company operates about 820 regularly scheduled one-way trips per day. That so much bus service is permitted below Memorial Bridge while comparatively little is permitted above Key Bridge constituted to the trial judge "[t]he most glaring example * * * of the discriminatory effect of the regulations * * *." 268 F.Supp. at 40.

[5]The basis for this conclusion was the fact that, while thousands of sightseeing bus trips are made each year on the southern portion of the Parkway, only a handful venture to the north. But the riders of sightseeing buses may well be more interested in historic sites than in scenic beauty. This could well explain the sightseers' preference for the southern sector of the Parkway.

traffic on the southern sector, while prohibiting it to the north, was unreasonable. He felt also that, because the CIA Building, airport and sightseeing buses were physically identical with the WV&M buses, to bar the latter on the northern sector of the Parkway, while permitting the former, was unreasonably discriminatory. He emphasized that he could not "understand how 52 daily suburban commuter buses operated by W. V. & M. could be aesthetically objectionable when approximately 200 airport and C.I.A. commuter buses * * * are not aesthetically objectionable." 268 F.Supp. at 44.

The Secretary, however, did not find that only WV&M buses were unsightly. In his affidavit he "reluctantly" concluded, "after weighing the interest of the public in retaining the present natural beauty of the Parkway and its environs[6] as against the compelling necessity to provide CIA employees swift and immediate access to their Agency," that direct commercial transportation to the CIA Building should be permitted on the Parkway. Similar considerations prompted his decision with regard to the use of the Parkway for access to Dulles International Airport.

A rationale for the Secretary's distinction between the southern and northern sectors of the Parkway was offered by Robert C. Horne, Associate Regional Director of the Capital Region of the National Park Service. He explained that the portion of the Parkway between Alexandria and Mount Vernon was authorized in 1928 and constructed in 1932. It replaced a previously existing commuter railway, and there have never been any limitations on commuter bus

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[6]The Secretary pointed out in his affidavit that Congress had expressed its concern "that the scenery and natural objects found on the George Washington Memorial Parkway * * * be conserved * * *," citing act of May 29, 1930 (46 Stat. 482), and act of August 25, 1916 (39 Stat. 535), as amended (16 U.S.C. § 1).

service.[7] It provides the two entrances to National Airport and connects with several cross streets and bisects several communities south of Alexandria. By contrast, the Parkway north of Key Bridge is a limited access road with no intersecting cross streets. It is known for its scenic beauty and was constructed in part to accommodate CIA personnel. It replaced no existing commuter highways or railroads, and general commuter bus service has never been allowed on any portion of it.[8]

As the distinguished trial judge recognized, there is a judicial presumption of validity of administrative action, and the burden is on WV&M to overcome that presumption. *Duesing* v. *Udall,* 121 U.S.App.D.C. 370, 374, 350 F.2d 748, 752 (1965), *cert. denied,* 383 U.S. 912 (1966). The court should not seek to make a *de novo* determination, and it need not agree with the Secretary's judgment in order to uphold it. For where there is more than one solution to an administrative problem the court will uphold any one that has a rational basis. *Udall* v. *Tallman,* 380 U.S. 1 (1965). Here the task of weighing the competing uses of federal property has been delegated by Congress to the Secretary of the Interior. The balance which he strikes will not be judicially upset unless it is arbitrary or beyond his authority. *United States* v. *Shimer,* 367 U.S. 374, 381-382 (1961), quoting *Bates & Guild Co.* v. *Payne,* 194 U.S. 106,

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[7]The section of the Parkway from Memorial Bridge south to Alexandria was originally closed to commuter buses, but was opened to such buses in 1942 as a wartime conservation measure to provide service to National Airport, then under construction.

[8]The section from Memorial Bridge north to Key Bridge was opened to traffic in 1937. The section from Key Bridge north to Spout Run was opened in early 1951. It is the section from Spout Run north to the CIA Building that was opened in 1959, in part to provide easy access to CIA personnel. *See* HEARINGS ON THE 1957 SUPPLEMENTAL APPROPRIATION BILL (Act of July 27, 1956, 70 STAT. 678) BEFORE SUBCOMMITTEES OF THE HOUSE COMMITTEE ON APPROPRIATIONS, 84th Cong., 2d Sess., Part 1, pp. 247, 255, 273, 304 (1956).

108-109 (1904). "Error or unwisdom is not equivalent to abuse." *A. T. & T. Co.* v. *United States*, 299 U.S. 232, 236 (1936). Where administrative control has been congressionally authorized, the judicial function is exhausted once there is found some "rational basis" for the action taken. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-287 (1934). *See also Thor Westcliffe Development, Inc.* v. *Udall*, 114 U.S.App.D.C. 252, 314 F.2d 257, *cert. denied*, 373 U.S. 951 (1963).

Such a basis clearly exists in this case. The Secretary reasonably concluded that, for historical and aesthetic reasons, unlimited commuter bus traffic should be permitted south of Memorial Bridge but not north of it. Similarly he reasonably concluded that, while all buses north of Memorial Bridge did detract from the Parkway's scenic beauty, considerations of public interest compelled the allowance of the limited service the Secretary permits. The fact that WV&M now makes only 52 unauthorized commuter trips per day on the Parkway north of Key Bridge, while the airport, CIA and sightseeing buses make 200, is certainly not decisive. Two hundred and fifty-two buses, authorized or unauthorized, are more unsightly and objectionable than 200. But even more important, the 52 daily trips which WV&M now runs in violation of the law might well become several hundred were its operations sanctioned by the Secretary or, though opposed by the Secretary, "authorized" by the courts.

Since the Secretary's discrimination in the use of the Parkway has a reasonable basis in the record, WV&M must seek a political, rather than a judicial, solution to its problem.

Reversed.

TAMM, *Circuit Judge, dissenting:* I would affirm the action of the District Court. I agree with the knowledgeable trial judge that the Secretary's regulations are "unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, insofar as they do not permit suburban commuter buses owned by W.V.&M. . . . to operate without limitation on the Parkway above the Key Bridge . . . ." It is inconceivable to me that the Secretary is able to justify as reasonable and authorized in law, his action in permitting two other bus operators to route identically constructed buses over the Parkway while refusing to permit a third operator, *id est,* Washington, Virginia, and Maryland Coach Company also to operate thereupon. To me the Secretary's justification constitutes an army of words escorting a modicum of reason. His action is nothing more than arbitrary bureaucracy masquerading as reasoned judgment. I do not believe that case law permits an administrative officer, even of cabinet rank, to bestow or withhold valuable franchises with the arrogance of an emperor distributing fiefdoms.

APPENDIX B

[Filed April 13, 1967]

C.A. No. 1172-63 and C.A. 2874-63 Consolidated

Opinion

This litigation involves a complex factual background and numerous legal issues; however, one issue stands out as paramount. That issue is whether the Secretary of the Interior through his delegate, the Director of the National Park Service, has discretionary power to limit suburban commuter bus traffic on part of the George Washington Memorial Parkway while not limiting such traffic on other parts of the Parkway. This litigation involves only those parts of the Parkway which are on the Virginia side of the Potomac River. Included in this issue is whether the Secretary has exercised his discretion in a reasonable and nondiscrminatory manner under the circumstances and whether the Secretary has the authority to exact a fee from suburban commuter bus companies for such use of the Parkway as is permitted.

Annexed hereto as Appendix A is a map showing most of the Parkway. Included are the sections of the Parkway which are involved in this litigation, the site of the Central Intelligence Agency (C.I.A.), and all bridges, access roads and intersecting roads which shall be referred to in this opinion.

Also annexed hereto as Appendix B are detailed Findings of Fact and Conclusions of Law.

Pleadings and Parties

The first of these two consolidated actions was initiated by the United States, requesting injunctive relief against the Washington, Virginia & Maryland Coach Company, Inc. (W. V. & M.), restraining it from continuing its unauthorized operation of a suburban commuter bus service over the Parkway between the Key Bridge and the C.I.A.

site, the newest section of the Parkway. The United States complained that W. V. & M. only has limited permission to use the Parkway—to carry passengers to and from the C.I.A.—and therefore it is violating Park Service Regulations by adding a wide network of commuter service to and from areas of northern Virginia beyond the C.I.A. Building and by routing this commuter traffic onto the Parkway. The government contends that W. V. & M.'s use of the Parkway is substantially more extensive under its unauthorized use than it would be if the Parkway were used only as authorized to serve the C.I.A. and direct return to Key Bridge. The government asserted that the regulations which grant to suburban commuter buses only limited access to the Parkway above Key Bridge are reasonable and necessary to preserve the scenic values of the Parkway.

In answer to this complaint, W. V. & M. denied the validity of the regulations upon which the United States requested this injunctive relief, claiming that the regulations are discriminatory in that they permit all buses except suburban commuter buses to use this portion of the Parkway in connection with services rendered off the Parkway, and by permitting all kinds of buses, including suburban commuter buses, to use the portion of the Parkway below the Arlington Memorial Bridge in connection with services rendered off the Parkway. The government's contention that suburban commuter buses detract from the Parkway's scenic values was answered by a denial that such buses have any noticeable effect upon prevailing aesthetic standards on the Parkway, and that even if there is such an effect it would still be unreasonable and discriminatory to insist on the preservation of scenic standards on the Parkway above the Key Bridge but not below the Arlington Memorial Bridge. W. V. & M. also counterclaimed for a return of fees paid under protest to the National Park Service of one cent per vehicle mile. These fees, for prior use of the Parkway, amounted to $2,284.16 at the time of trial.

The D. C. Transit System, Inc., the parent corporation of W. V. & M., intervened as a defendant. Also intervening as defendants were the Washington Metropolitan Area Transit Commission (hereinafter referred to as the WMATC) and the State Corporation Commission of the Commonwealth of Virginia (hereinafter referred to as the Virginia State Commission). Although limited, the interventions of the two commissions was for the purpose of joining with the bus companies in emphasizing the legislative aspects of this litigation. The legislative element in this case concerns the issue of whether the act of September 15, 1960, (74 Stat. 1031) authorizing The Washington Metropolitan Area Transit Regulation Compact has any effect upon the powers and authority of the Secretary of the Interior or the National Park Service to regulate the kind and amount of suburban commuter bus traffic on the Parkway. The interests and contentions of the commissions and D. C. Transit are substantially identical with those of W. V. & M.

The second suit, brought by W. V. & M., raised substantially the same issues with three minor additions: first, W. V. & M. sought review of Park Service Regulations to the extent that they do not permit suburban commuter buses to travel on the Spout Run "neck" of the Parkway (a short deviation from the main Parkway route northwest of Key Bridge into Arlington proper), and between Key Bridge and Memorial Bridge (Route 50); second, W. V. & M. requested that the Secretary and the Park Service be enjoined from collecting fees for any use of the Parkway by commuter buses; and, third, D. C. Transit intervening as plaintiff sought review of Park Service Regulations to the extent that such regulations do not permit suburban commuter buses to use the northernmost part of the Parkway from the Beltway southward to the C.I.A., a stretch of about two miles. D. C. Transit presently carries suburban commuters from Maryland, who work at the C.I.A., across the Potomac River via the Cabin John Bridge on the Beltway (Interstate Route 495).. Because

present regulations preclude D. C. Transit from using the two-mile "shortcut" on the Parkway from the Beltway to the C.I.A., a longer and more indirect route must be taken by continuing west on the Beltway past the entrance to the Parkway, on to Route 193, then doubling back on Route 193 to the other C.I.A. entrance.

The parties are slightly different in the second suit. Rather than the United States, the Secretary of the Interior and the Director of the National Park Service were named as defendants. The WMATC and the Virginia State Commission were named defendants in the second action although the positions taken by them are almost identical with those taken by the plaintiff bus companies. Whatever procedural advantages may have been obtained by naming the two commissions as defendants in the second suit, the Court will now treat both bus companies and both commissions as being aligned on the same side against the United States, the Secretary of the Interior, and the Director of the National Park Service.

Background and Factual Summary

The Parkway is owned and controlled by the Federal Government. In Virginia it consists of an elongated national park running parallel to the bank of the Potomac River with a multi-lane highway as its most distinctive feature. From Mount Vernon, at its southern end, it stretches northwestward through Fairfax County, the City of Alexandria, Arlington County, and again, Fairfax County, Virginia. On its northwestern end it terminates at Interstate Route 495, the circumferential highway which forms a beltway around the major portions of the Washington metropolitan area.

For purposes of this litigation the Parkway has been referred to by various sections according to the sequence in which it was constructed. First, there is the southeastern part running from Mount Vernon through the

City of Alexandria, past the National Airport, and terminating at the Arlington Memorial Bridge (Route 50). This part of the Parkway was once known as the "Mount Vernon Memorial Highway" and was completed in 1932. The Parkway above the Arlington Memorial Bridge was added section by section. In 1937, a short stretch was completed between Memorial Bridge and Key Bridge. In December 1950, the "Spout Run" section of the Parkway was completed. This section runs northwestward from Key Bridge but after less than one mile it deviates southwestward, away from the Potomac River and goes into Arlington proper.

The final stretch of the Parkway was completed in early 1960. It begins where the Spout Run portion deviates away from the Potomac, and continues northwestward along the Potomac Gorge, terminating at the Beltway.

The building which houses the Central Intelligence Agency was completed and opened in the fall of 1961. The C.I.A. site is adjacent to the Parkway, about two miles southeast of where the Parkway terminates at the circumferential highway. The C.I.A. site is served with an access road to and from the Parkway. The C.I.A. site is also served on its opposite side by State Routes 123 and 193, which join when they reach the C.I.A. site and continue toward Washington as Route 123. Going toward the District of Columbia and after passing the C.I.A. site, Route 123 goes over the Parkway at a clover-leaf intersection below the C.I.A. site and continues southeastward between the Parkway and the Potomac, connecting with Chain Bridge into the District of Columbia.

The National Park Service views the various sections of the Parkway differently with reference to what kind of commercial traffic will be permitted. Taxicabs are permitted to travel on any portion of the Parkway without payment of any fee. Commercial trucks are not permitted on any part of the Parkway except in special cases and

consequently there is no general provision for fees as to them.

With respect to commercial buses, however, use of the Parkway depends on two factors: what kind of service the buses render, and what portion of the Parkway is involved. First, as to the kind of service rendered, sightseeing buses, and airport buses serving Dulles and National Airports, are permitted on any portion of the Parkway which is desired and needed for those particular services subject to obtaining a permit and paying a fee. There are also buses owned by the Federal Government which are used as a shuttle service between the C.I.A. and points in downtown Washington. These government-owned buses are permitted on the Parkway south of the C.I.A. without payment of a fee and in this respect are given more favored treatment than buses of W. V. & M. which are permitted the same use of the Parkway from Key Bridge to the C.I.A., but contingent upon payment of a fee of one cent per vehicle mile. Park Service Regulations prohibit W. V. & M. (or *any* suburban commuter bus company) from going beyond the C.I.A. to serve suburban residents in outlying northern Virginia, and, thus, these "C.I.A. commuter buses" operated by W. V. & M. are to be distinguished from "surburban commuter buses." In reality, therefore, any bus company (such as W. V. & M.) which operates on the Parkway to and from the C.I.A. under this special regulation, is merely operating a shuttle service for the benefit of the C.I.A. and its employees in competition with, and identical to, the government-owned shuttle service.

The second distinction made by Park Service Regulations deals only with "suburban commuter buses." Rather than depending on the kind of service which a bus renders, this distinction is based on different parts of the Parkway. For example, commuter buses which actually carry passengers between downtown Washington and points in residential areas of suburban Virginia ("suburban com-

muter buses") are allowed unlimited use of the Parkway only on the southern part between Memorial Bridge and Mount Vernon. Such buses, regardless of what company owns them, cannot operate above Memorial Bridge except for the limited "C.I.A. commuter service," without violating Park Service Regulations.

Simply stated, the regulations appear to discriminate against suburban commuter bus companies desiring to use the Parkway to serve the northern section of suburban Virginia. This is the basic complaint of the bus companies in this litigation. They want the restrictive regulations declared invalid, including the provisions which require the payment of a fee for such use of the Parkway as is now permitted or will in the future be permitted.

A few statistics will demonstrate the difference in treatment accorded suburban commuter bus companies desiring use of the Parkway above the Memorial Bridge when contrasted with the treatment accorded other bus companies rendering other kinds of passenger service over the same portion of the Parkway. Using the nine month period from January 1 to September 30, 1966, as an example, the evidence established that W. V. & M. operates an average of 52 one-way trips per day between Key Bridge and the C.I.A. This use of the Parkway includes service to outlying suburban Virginia in excess of the authority granted by Park Service permits and Regulations. Using the same period as an example, the evidence shows that Airport Transport, Inc. operates an average of about 98 one-way trips per day between Dulles Airport and a terminal in downtown Washington. These airport buses use the Parkway between Key Bridge and its intersection with Route 123 near the C.I.A. Occasionally, Airport Transport also carries passengers between Dulles and National Airports, in which event the Parkway is also used between Key Bridge and National Airport. On such occasions a limousine, rather than a bus, is generally used. The government-

owned shuttle service between the C.I.A. and Key Bridge on the Parkway also involves about 99 one-way trips per day, about 52 of which are by bus and the rest by limousine.

The most glaring example, however, of the discriminatory effect of the regulations can be illustrated by comparing the use of the Parkway above Key Bridge by W. V. & M. with the use of the Parkway below Arlington Memorial Bridge by A. B. & W. (Alexandria, Barcroft & Washington Transit Company) also a suburban commuter bus company. A. B. & W. is permitted to operate about 820 one-way trips per day on the Parkway below Arlington Memorial Bridge. It should be noted that not all of these trips cover the entire stretch between the Memorial Bridge and Mount Vernon. Many, if not most, of these trips enter or leave the Parkway between these two points; however, the fact remains that about 820 suburban commuter buses per day are permitted to travel at least some distance on the Parkway below the Memorial Bridge while carrying passengers to and from outlying suburban areas off the Parkway.

For a complete comparison between Parkway use by suburban commuter buses above Key Bridge with all other use of the Parkway by all other buses, something should be said about sightseeing buses. Between January 1 and October 31, 1966, the National Park Service issued 1224 one day permits (an average of about 4 per day) to the Gray Line in connection with its sightseeing tours A and D conducted over the Memorial Bridge—Mt. Vernon portion of the Parkway. In almost the same period (January 1st to October 19th) A. B. & W. was issued 610 sightseeing permits (an average of about 2 per day) for operations over the same portion of the Parkway. The White House Sightseeing Corporation also operates one or two daily sightseeing trips, and perhaps as many as 5 per day during the peak tourist periods, most of which are conducted over this southern portion. Finally, out-of-state carriers op-

erating over the southern portion of the Parkway are granted an indeterminate number of sightseeing permits at Mt. Vernon by the National Park Service for operations over the southern portions of the Parkway. The evidence adduced at trial indicates that very few, if any, sightseeing buses travel on the Parkway above Key Bridge.

Because an issue has been brought into this case of whether certain legislation enacted in 1960 may have modified or diminished the power of the Secretary of the Interior to regulate suburban commuter bus traffic on the Parkway, some facts as to this legislation should be stated. On September 15, 1960, the Congress of the United States gave its consent and approval (74 Stat. 1031) to a proposed interstate agreement ("Compact") between Virginia, Maryland and the District of Columbia. This Compact, finally ratified by the three signatories on December 22, 1960, established a commission, the WMATC, for the regulation of carriers of passengers between points in the metropolitan area of the District of Columbia. Under Article I of the Compact, the District of Columbia and suburban counties in Virginia and Maryland were included in a "Washington Metropolitan Area Transit District" over which the WMATC would have regulatory authority. In Virginia this District includes the City of Alexandria, the Counties of Arlington and Fairfax and that portion of Loudoun County occupied by Dulles Airport. In Maryland this District includes Montgomery and Prince Georges Counties. The District therefore includes all parts of the Parkway involved in this litigation.

The purpose of the enabling Act and Compact was the unification in one agency of all authority over commuter transit within this District which was previously vested in the several signatories and the Interstate Commerce Commission. The newly created Commission, the WMATC, was granted the power to issue certificates of public convenience and necessity, prescribe routes, set fares, and

otherwise to govern commuter bus traffic in the metropolitan area.

Another important factor is that W. V. & M. and D. C. Transit have been granted certificates by the WMATC to travel on the contested portions of the Parkway to serve suburban commuters. These certificates, however, contain a proviso that the bus companies must meet any criteria set by the Park Service. In other words, the WMATC, in prescribing a route over the Parkway, does not assume to have the power to overrule Park Service Regulations to the contrary; instead, the WMATC specifically states that it is for the bus company involved to comply with Park Service Regulations with respect to Parkway use.

This practice of the WMATC in adding a proviso to its certificates requiring the carrier to satisfy Park Service Regulations is no doubt based upon the specific language of Section 3 of the Act of Congress which authorized the Compact and the creation of the WMATC. Section 3 contains the following proviso:

> * * * *Provided further,* That nothing in this Act or in the compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities.

With respect to the fee requirement of one cent per vehicle mile for use of the Parkway by suburban commuter buses, I find that such fees are well within the limits set by other governmental authorities as to fees ("road taxes") required for use of city and state roads by commuter buses. Arlington County and the District of Columbia require fees of one cent per vehicle mile. These so-called "franchise fees" are also exacted on a mileage

basis by the City of Fairfax, the City of Falls Church, and the City of Vienna, Virginia.

Returning now to the discrimination issue, certain facts should be stated about the government's position. The government argues that the presence of suburban commuter buses on the Parkway above Key Bridge is aesthetically objectionable, *per se*, and therefore the regulations designed to limit access to the Parkway by such buses have a rational basis and are valid.

The government also points to an alternative route, via Route 123 and Chain Bridge, which W. V. & M. buses employed before the northern leg of the Parkway was completed and which is still available, although it is slower and a more circuitous route to and from downtown Washington. With respect to D. C. Transit's desire to use the two-mile shortcut to the C.I.A. at the northwest end of the Parkway, the government also points to the availability of the alternate route via the Beltway and Route 193 which D. C. Transit is presently using.

Finally, the government contends that a rational basis exists for the regulations which differentiate between the old and new sections of the Parkway (below Memorial Bridge and above Key Bridge, respectively). As to this contention the government argues that the old section below Memorial Bridge was originally a "Highway" and that only after it was authorized and construction begun was it designated as part of the George Washington Memorial "Parkway." The government further contends that when this section was constructed it partially took the place of a pre-existing commuter railway; that it was designed and constructed with bus stops; and that unlike the newer section above Key Bridge, it has many intersecting streets (without clover-leaf features) which are regulated by stop lights. In effect, the government is saying that although this old "highway" is now under the authority of the Park Service and is designated as part of a Federal

Parkway, it is historically and realistically proper for the Secretary and the Park Service to consider it and govern it as a separate entity apart from the new section of the Parkway above Key Bridge.

Apart from the availability of alternate routes, the government has not established this theory from the evidence adduced at trial. First, from the evidence I cannot find that there is anything aesthetically objectionable, *per se*, about having commuter buses on the Parkway above Key Bridge. The government has offered no valid reason which even attempts to justify a *per se* approach to this problem. In my view, a *per se* approach to solving a problem is only used when prior experiences with similar or identical problems is so convincing that evidence need not be introduced in a given instance to prove what has been proven many times in previous cases. The Court has found no such prior cases involving parkways and commuter buses and the parties have cited none.

Second, and without taking a *per se* approach, I find that the government has not proved that suburban commuter buses have any adverse effect upon scenic aspects of the Parkway at the time of day when such buses would be using it.

In this case the government's only evidence that suburban commuter buses are spoilers of parkway scenic values is a self-serving letter to that effect from the Director of the National Park Service to the WMATC dated November 2, 1962 (Government Exhibit No. 23). The statements made in that letter are opinions rather than facts; there was no opportunity afforded counsel to cross-examine the Director of the Park Service on the contents of the letter or the assumptions upon which it was based; and there was no independent evidence introduced along the same lines such as expert opinions or testimony of lay persons who were familiar with the scenic values of the Parkway.

Early in this litigation, on January 10, 1964, affidavits by Stewart L. Udall, the Secretary of the Interior, and other officials of the Department of the Interior were filed in support of the government's motion for summary judgment. That motion was denied on February 28, 1964. Since the affidavit of the Secretary was not introduced into evidence, it cannot be considered by the Court; however, even if it were evidence in this case, it would give little support to the government's position. The pertinent parts of the affidavit are as follows:

• • •

> In my judgment, it would be contrary to the public interest to allow permanent commuter bus service upon the George Washington Memorial Parkway for the purpose of transporting passengers between the Virginia suburbs and the District of Columbia. The use of this Parkway by ever-increasing numbers of commuter buses with their great bulk, trucklike characteristics, and odors, as is contemplated by the Washington, Virginia & Maryland Coach Company, would, in my opinion, physically damage the scenic value of the Parkway. Further, other routes are available for transportation of passengers between the District of Columbia and the suburbs of Northern Virginia.
>
> In my judgment, allowing permanent commuter bus service of the nature described above, would not be in the public interest, and would be inconsistent with the intendment of Congress.

• • •

In addition to the fact that this opinion was not offered into evidence, nowhere does the Secretary attempt to justify the application of these alleged public interest factors to only *part* of the Parkway. Since the affidavit shows no recognition of the fact that on a daily basis more than 800 suburban commuter buses are operated by A. B. & W. on the Parkway below the Arlington Memorial Bridge, it loses

any relevance to the issues as they are now before the Court. The basic problem in this case is no longer whether the preservation of scenic values, alone, would justify exclusion of commuter buses from the Parkway. The Court agrees that, as an abstract principle, the Secretary does have the authority to deny access by any class of commercial vehicle to all sections of the Parkway. Such a policy has been adopted by the Secretary with respect to trucks. They are not allowed on any section of the Parkway except in special cases. However, the regulations which govern suburban commuter buses employ a double standard—depending upon which part of the Parkway is involved.

I find that regardless of the historical background of the various sections of the Parkway, it is now one Parkway—not two—and that the original congressional authorization for its construction and maintenance had the effect of combining and unifying all pre-existing parts of it, together with such extensions of it as may be added thereafter, into one continuous National Parkway.

To summarize the factual situation just presented, the evidence convinces me that the Park Service Regulations here in issue, except those as to fees and those designed to protect a short stretch of the Parkway which has weak construction and cannot withstand heavy bus traffic, discriminate against suburban commuter bus companies desiring to use the Parkway above Key Bridge. The regulations discriminate between Parkway use above Key Bridge when contrasted with Parkway use below Memorial Bridge; and with respect only to the Parkway above Key Bridge there is also a double standard—one for commuter buses and the other with respect to other buses rendering similar but not identical services such as airport buses.

Discussion

The issues of discrimination and unreasonableness must be analyzed within a legal framework which is fairly clear

and about which all the parties seem to agree. The bus companies, citing *Eastern Central Motor Carriers Ass'n* v. *United States*, 239 F. Supp. 591, 594 (D.C.D.C. 1965) maintain that the allegedly discriminatory regulations must be found invalid if they are without a rational, substantial or sound basis. Other cases are cited to the same effect.[1] Reliance is also placed on Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, which contains a general prohibition against administrative regulations or orders which are either "* * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *."

The WMATC and the Virginia State Commission urge a similar standard. Citing *Sproles* v. *Binford*, 286 U.S. 374, 396 (1932), and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), the commissions contend in their brief that the regulations must be declared invalid if they "lack a rational basis."

This is precisely the same test which the government seeks to have applied in this case. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Miss. Valley Barge Co.* v. *United States*, 292 U.S. 282, 286-287 (1934) (cited in the government's post-trial brief).

What the issue comes down to is this: In view of the broad discretion vested in the Secretary and the Park Service, and in view of the limited role of the reviewing Court, does the evidence show a rational basis for the regulations here in issue? I conclude that the evidence does not show a rational basis for the regulations as they now exist.

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1 *Jenkins* v. *Macy*, 237 F. Supp. 60, 62 (E.D. Mo. 1964), affirmed 357 F. 2d 62; *Irvin* v. *Hobby*, 131 F. Supp. 851, 865 (N.D. Iowa 1955); *NLRB* v. *Minnesota Min. & Mfg.*, 179 F. 2d 323, 326 (8th Cir. 1950); and *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 695 (9th Cir. 1949) *cert. denied* 338 U.S. 860, *rehearing denied*, 339 U.S. 945.

The first step in applying the "rational basis" test which the parties seem to agree upon, is a proper understanding of the facts; however, while searching the facts and circumstances of this case to find a rational basis for the regulations, just the contrary has become clear to the Court. First, the Court cannot understand how 52 daily suburban commuter buses operated by W. V. & M. could be aesthetically objectionable when approximately 200 airport and C.I.A. commuter buses of the same style and size, operating over the same route, are not aesthetically objectionable. Second, the Court cannot understand how the government can, in good faith, request injunctive relief against these 52 daily bus trips when the Park Service allows more than 800 daily trips below Memorial Bridge by buses with identical physical characteristics and performing an identical service. Even without more, these facts establish the allegations that the regulations lack a rational basis and that they are discriminatory, unreasonable and therefore invalid.

The government, perhaps anticipating the Court's rejection of its contention that "preservation of scenic values" is, *per se*, a rational basis for the regulations, sought to establish that the Parkway is a scenic Parkway only above Key Bridge, with an older, multiple access "Highway" tacked onto its southern extremity. In addition to my finding that this is factually not true, the evidence establishes the contrary. In direct conflict with this contention is the fact that literally thousands of sightseeing bus trips are made every year on the Parkway south of the Memorial Bridge but that very rarely do any of them travel on any portion of the Parkway above Memorial Bridge. The activity of these sightseeing buses is strong evidence, contrary to the government's contention, that the Parkway below Memorial Bridge is a scenic attraction which equals and perhaps surpasses the newer section above Key Bridge.

In my opinion, the Secretary and the Park Service are "clearly wrong" and the weakness of the "scenic values"

argument is "so manifest that the Court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the Act of Congress."[2]

In addition to the foregoing, something should be said about certain aspects of this case which may not be clearly presented on the record. The Court received the impression that there is more to this controversy than meets the eye. Because of the peculiar or unusual nature of certain cases it is often difficult to understand the "theory" upon which the respective parties are proceeding; however, in this case there were too many inferences to be drawn from the evidence—all pointing to the same problem—for the Court not to comment. My comments are also intended as an assurance to the parties that certain elements of the case did not go unnoticed by the Court.

The "buried problems" involves the whole question of adequate highways and mass transit facilities to handle the large and growing volume of commuter traffic in the District of Columbia metropolitan area. The problem is most acute in the Virginia suburbs because traffic to and from the District of Columbia must squeeze onto a few bridges across the Potomac River. This case presents a unique

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[2] Quoting from *Boski* v. *Comingore*, 177 U.S. 459, 470 (1900) (cited in the government's post-trial brief). The Act of Congress which is relevant here is the Act of August 25, 1916 (39 Stat. 535 as amended, 16 U.S.C. §§ 1, 3) which directs the Secretary of the Interior and the National Park Service to

> "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (16 U.S.C. § 1).

This Act also authorized the Secretary of the Interior to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." (16 U.S.C. § 3).

aspect of this problem because the Parkway provides direct access to Key Bridge, Theodore Roosevelt Memorial Bridge, Arlington Memorial Bridge and the "14th Street" Bridge, all of which provide Virginia commuters with direct access to the downtown area of the District of Columbia. The motion pictures which are in evidence amply support a finding of which the Court could take judicial notice anyway; that however one might view it, the Parkway is an extremely heavily travelled commuter highway. To the thousands of commuters who use it and to the officials who must regulate it, it is not a scenic parkway during weekday rush hours and no amount of wishful thinking can make it so without a drastic highway building program in suburban Virginia to ease the load on the Parkway.

The significance of this state of affairs is that the Secretary may have reasons quite a part from what he calls "scenic values" for the strange and discriminatory set of regulations which now prohibit suburban commuter buses from the northern portion of the Parkway. I seem to detect an implied warning, directed across the Potomac toward Virginia, and also toward the WMATC, that the Parkway cannot be relied upon, as it has been in the past, as a route to be used for easing the mounting pressure of commuter traffic, including mass transit, in lieu of new highways being opened.

I mention this latent element in this case because there undoubtedly must be more to the government's position than the "scenic values" and "old highway-new parkway" arguments which have been relied upon. These two theories do not have substantial evidence in the record to support them and they do not provide a rational basis for the unfair and discriminatory double standard regulations which presently apply to the suburban buses using the Parkway. These, nevertheless, are the contentions advanced by the government and I have no alternative but to invalidate this regulatory pattern in the absence of a rational basis in the evidence of record.

The government, on the other hand, has demonstrated a rational basis for the fee requirement which applies to buses using the Parkway and to the prohibition against buses traveling on the structurally weak section of the Parkway between Key and Memorial Bridges. The cost of maintenance is a substantial and rational basis for these two aspects of the Parkway regulatory pattern.

As to the counterclaim by W. V. & M. in Civil Action No. 1172-63 (the first of these two actions, wherein the United States is plaintiff) requesting a return of $2,284.16 representing fees paid by W. V. & M. up to the time of trial, the Court concludes, as an alternative reason for denying this particular request, that it is without jurisdiction. This counterclaim is a demand against the United States and even though it is under $10,000.00 it does not state a claim under the Tucker Act, 28 U.S.C. § 1345 (a) (2), because it is not based on either an express contract or a contract implied in fact. It is therefore a claim for damages against the government without the government having given its consent to be sued. See *Cobb* v. *Shore,* 87 U.S. App. D.C. 162, 183 F. 2d 980 (1950); *Alabama* v. *United States,* 282 U.S. 502, 506 (1931); *United States* v. *Minnesota Mutual Investment Co.,* 271 U.S. 212, 217 (1926).

The Court concludes therefore that the Regulations of the Park Service are valid and have a rational basis except for those which deny W. V. & M. and D. C. Transit unlimited access to the Parkway above Key Bridge for their suburban commuter buses. So long as the regulations permit unlimited commuter bus use of the Parkway below Arlington Memorial Bridge, permits for such traffic above the Key Bridge must also be granted.

The regulations may exclude *all* commuter buses from the Parkway, but access or exclusion must not be discriminatory. Such regulations could permit such traffic only during certain hours of the day or during all hours of the day, but whenever granted the present distinctions between

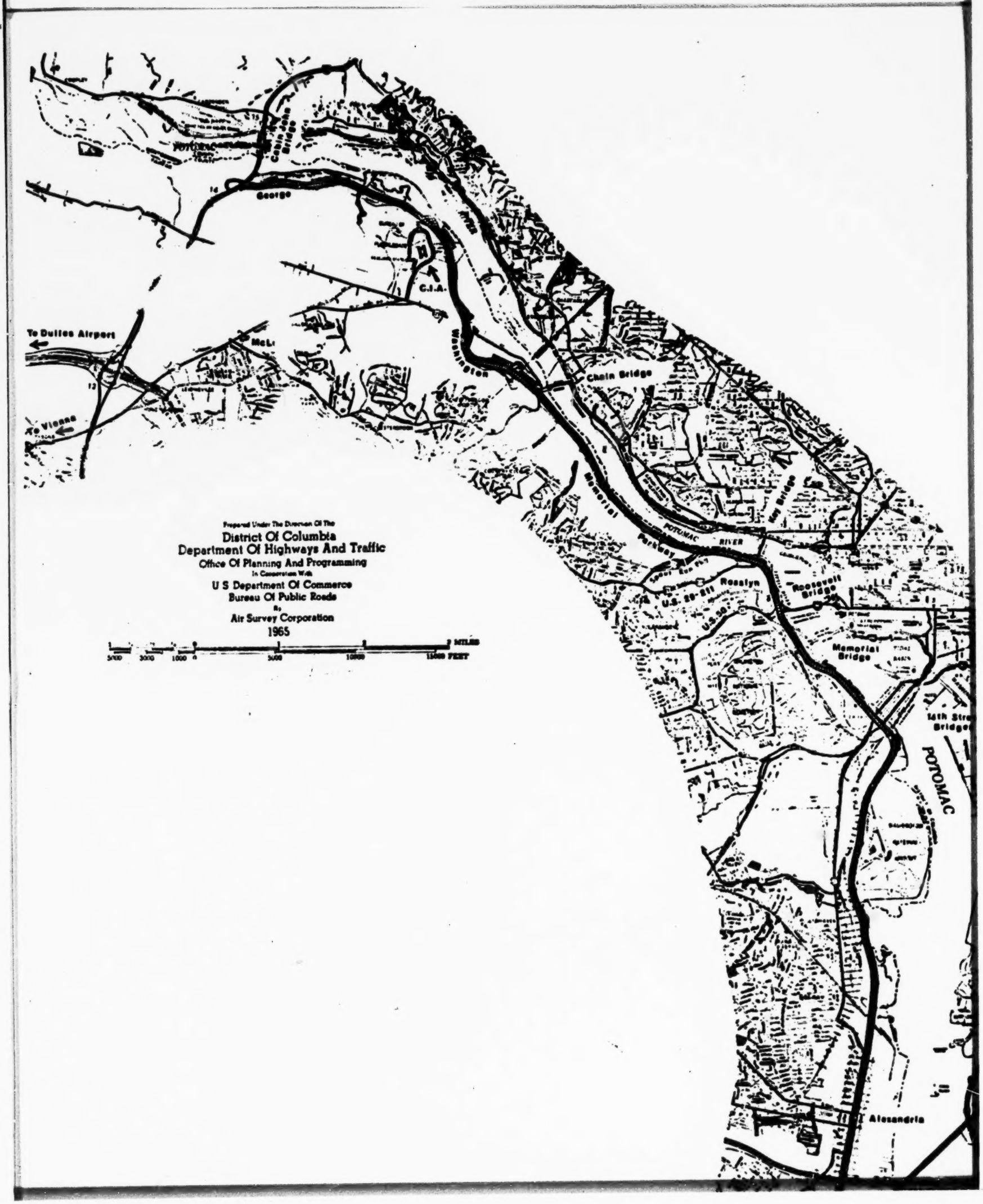
buses using the northern and southern portions of the Parkway cannot be part of the regulatory pattern.

This opinion, together with the detailed Findings of Fact and Conclusions of law annexed hereto as Appendix B shall constitute all of the findings of fact and conclusions of law in this case.

Counsel will submit an appropriate order.

/s/ JOHN J. SIRICA
United States District Judge

April 13, 1967



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Office Of Planning And Programming
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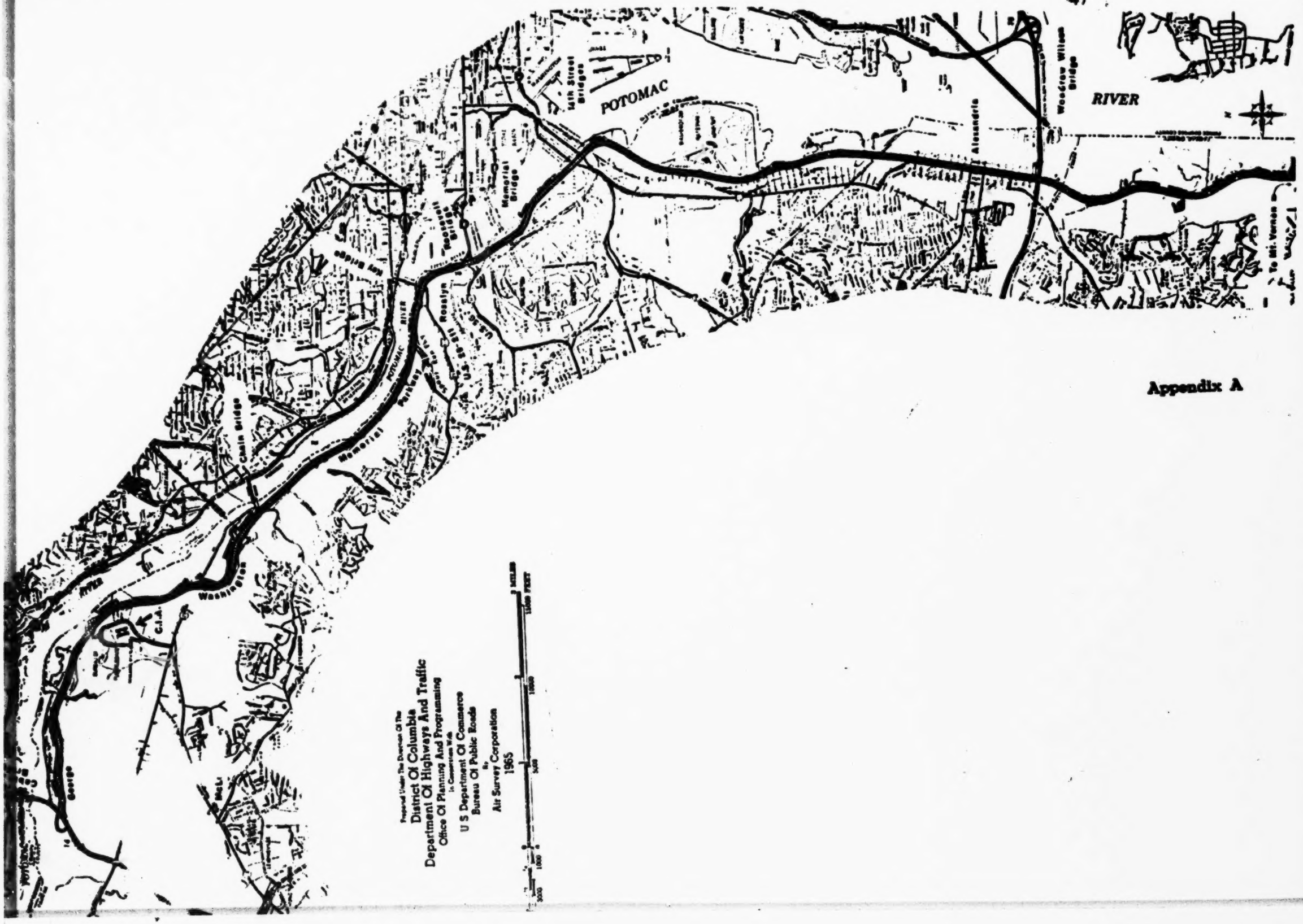
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Appendix A

[Filed April 13, 1967]

FINDINGS OF FACT

(1) Title to the George Washington Memorial Parkway is vested in the United States. Administration of the Parkway is a responsibility of the National Capital Region of the National Park Service under the jurisdiction of the Secretary of the Interior. The Act of August 25, 1916 (39 Stat. 535, as amended, 16 U.S.C. § 3), authorized the Secretary of the Interior to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service."

(2) Pursuant to Section 1 of the Act of August 25, 1916 (39 Stat. 535, 16 U.S.C. § 1), the National Park Service is directed to "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

(3) Following the opening of the George Washington Memorial Parkway from Spout Run to the C.I.A. Building on November 3, 1959, the Department of the Interior, on December 30, 1959 (24 Fed. Reg. 11019), adopted the following regulation [36 C.F.R. (1960 Rev.) 3.36(b)(2)], with particular reference to the operation of commuter buses on the Parkway:

> Passenger carrying buses for hire or compensation shall be permitted on the George Washhington Memorial Parkway upon application for, and the granting of a permit by the Superintendent, National Capital Parks, issued on an annual basis, effective from April

> 1 until the following March 31, at the rate of $3 for each passenger-carrying seat in every vehicle so operated. Such permits may be issued (i) to provide passenger service on any portion between Mount Vernon and the Arlington Memorial Bridge, (ii) to provide limited direct non-stop passenger service between Key Bridge and the Central Intelligence Agency at Langley, Virginia, and (iii) to provide limited direct non-stop passenger service between the interchange at Route 123 and the Central Intelligence Agency Building at Langley, Virginia.

Subsequent to the publication of these regulations, the W. V. & M. Coach Company, on February 15, 1960, petitioned the Secretary for a modification thereof and a hearing on the petition. Such hearing was held on February 29, 1960; however, no report containing findings of fact, conclusions of law, or orders was ever served on W. V. & M.

(4) On April 18, 1960, the Interstate Commerce Commission[1] issued a certificate of public convenience and necessity to W. V. & M. to provide commuter bus service to the C.I.A. Building. This permit authorized W. V. & M. to travel over the Parkway between Arlington Memorial Bridge (Route 50) and the C.I.A. Building and it authorized bus travel over the Spout Run Parkway. A restriction in the permit stated that:

> The authority granted herein is subject to compliance by said carrier with any rules, regulations, or requirements which may be by law maintained or adopted by the Secretary of the Interior in connection with his administrative jurisdiction over matters relating to national parks.

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[1] The WMATC had not yet been created, thus, the I.C.C. still had jurisdiction over the commuter service rendered by W. V. & M. between Virginia and the District of Columbia.

(5) With the opening of the C.I.A. Building in the fall of 1961, W. V. & M. applied for a permit to "initiate express bus service over the George Washington Memorial Parkway to the C.I.A. Building at Langley, Va." Pursuant to the foregoing regulation, a Park Service permit was issued authorizing use of the Parkway, as requested, to furnish service to and from the C.I.A. Building only. The pertinent provisions of this permit were as follows:

> Permission is granted to operate buses on the following portions of the George Washington Memorial Parkway in accordance with existing regulations:
>
> 1. To provide limited direct non-stop passenger service between Key Bridge and the Central Intelligence Building at Langley, Virginia.
>
> 2. To provide limited direct non-stop passenger service between the interchange at Route 123 and the Central Intelligence Building at Langley, Virginia.

(6) For a short period of time in late 1961, W. V. & M. operated a bus service, as authorized by the Park Service permit and regulations, from downtown Washington to the C.I.A. Building and return. At this time, W. V. & M. provided suburban commuter bus service from the northern Virginia area to Washington by a scheduled route that proceeded down Highway 123, over the Parkway at a clover-leaf intersection, across Chain Bridge into the District of Columbia, and thence to downtown Washington.

(7) In the summer of 1962, it was ascertained that W. V. & M. had ceased to use the Parkway solely for commuter service to the C.I.A. Building. Instead, suburban commuters were picked up in Washington whose destination was beyond the C.I.A. Building, and these buses, after stopping at the C.I.A. Building, would proceed beyond that point into suburban Virginia to discharge passengers. On return runs, suburban commuters would be picked up by a bus that would stop at the C.I.A. and then proceed down

the George Washington Memorial Parkway into Washington. Although the scheduled route via Route 123 and Chain Bridge was still used by W. V. & M., the unauthorized increase in Parkway use lessened the use of Route 123 and Chain Bridge.

(8) On November 16, 1962 (27 Fed. Reg. 11346), the applicable regulation [36 C.F.R. (1966 Supp.) 3.36(b)(3)(i)] was amended. The provision relating to commuter buses was altered slightly to make clear that the service to the C.I.A. was to a "terminus" at the C.I.A. Building, with "direct return." In other words, this amendment was designed to make sure that W. V. & M. knew it was not authorized to use the Parkway for carrying passengers picked up or to be discharged beyond the C.I.A. Building.

(9) On November 16, 1962, a revised Park Service permit was issued to W. V. & M. to be effective until June 30, 1963. This permit merely modified the language of the previous permit to reflect the changes in the applicable regulation, that is, to plainly state that the Parkway use was limited to a "terminus" at the C.I.A. Building and "direct return" to Key Bridge.

(10) On December 14, 1962 W. V. & M. petitioned the Secretary for a modification of these regulations and for a hearing. This petition was denied on March 14, 1963, without explanation or further elucidation of the reasons for restricting commuter buses on the Parkway above Key Bridge. Meanwhile, W. V. & M. did not accept the revised permit and has since, despite objections made by representatives of the Department of the Interior, continuously exceeded the terms of the permit and the regulations by operating buses on the George Washington Memorial Parkway which carry suburban commuters and not limited to providing service only to the C.I.A. Building and direct return. For example, W. V. & M.'s Route 5-C picks up passengers as far away as Seven Corners, Virginia. This route, instead of proceeding east to the District of Colum-

bia down U. S. Highways 29 and 211 through the center of Arlington and across Key Bridge, goes the opposite direction on those highways and eventually proceeds down Route 123, and the Parkway, to Key Bridge.

(11) On October 27, 1964, the WMATC issued a certificate of public convenience and necessity to W. V. & M., covering the Route 5-C, which prescribed use of the Parkway for transporting commuters to and from a large area of Northern Virginia. This certificate contained the following statement: "It is for the carrier to meet any requirements adopted by the Signatories and the Park Service pursuant to their 'normal and ordinary' police powers." Without meeting such requirements, W. V. & M. is, nevertheless, operating its Route 5-C as authorized only by the WMATC while contending that its failure to comply with Park Service Regulations is due to the invalidity of the regulations.

(12) For its part, D. C. Transit has authority from the WMATC to operate over the portion of the Parkway between the C.I.A. site and the Beltway (Interstate 495); however, the Park Service has refused to permit such operations. D. C. Transit, while objecting to this refusal by the Park Service, has refrained from using the Parkway.

(13) The regulations of the National Capital Region of the National Park Service (36 C.F.R. 3.36) authorize the issuance of general unlimited permits for commuter bus service on that portion of the Parkway between Mount Vernon and the Arlington Memorial Bridge. This unlimited use is in contrast to the limited use permitted north and west of the Key Bridge. The regulations also permit concession-authorized nonscheduled bus service to Dulles and National Airports for the accommodation of air travelers. Airport Transport, Inc., by a concession agreement with the Federal Aviation Authority, provides nonscheduled, direct, nonstop service between Dulles and downtown Washington, and between Dulles and National Airports for

the accommodation of air travelers in the Washington area. Portions of the Parkway are used to provide this service to air travelers and Airport Transport holds a permit in connection with this use of the Parkway. The regulations also allow sightseeing buses to use any portion of the Parkway at any time upon obtaining a permit and payment of fees. The airport and sightseeing buses are not limited in their use of the Parkway to certain portions thereof; however, as a practical matter, almost all sightseeing bus traffic is south and east of the Arlington Memorial Bridge.

(14) The regulations of the Secretary of the Interior, since their amendment on December 30, 1959 [24 Fed. Reg. 11019, 36 C.F.R. (1960 Rev.) 3.36(b)(2)], have not authorized the issuance of a permit to W. V. & M. to use the Parkway between Key Bridge and Arlington Memorial Bridge (Route 50). In practical effect, this means that buses providing direct service to and from the C.I.A. Building or suburban commuter service to outlying areas must enter and leave the District of Columbia via Key Bridge rather than via the Roosevelt Bridge or the Arlington Memorial Bridge. These latter two bridges provide a quicker and more direct route between certain parts of suburban Virginia and much of the downtown area of Washington than does the Key Bridge. In addition, the regulations do not permit the operation of commuter buses down the Spout Run part of the Parkway which has the practical effect of requiring the buses which would otherwise use this section of the Parkway to use slower routes to reach either Key Bridge, Roosevelt Bridge or the Arlington Memorial Bridge.

(15) The section of the Parkway between the Key Bridge and the Arlington Memorial Bridge was constructed in 1937 and it does not have the same subsurface strength that underlies other portions of the Parkway. It is subject to seepage from the adjacent hillsides and breaks easier under the stresses of heavy traffic. It has been a mainte-

nance problem and today shows evident signs of constant cracking and patching. It is considered by the Interior Department and the Park Service as not being capable of withstanding heavy bus traffic. At present no commuter buses are allowed on this portion of the Parkway. The limited amount of travel by Airport Transport, Inc. on this section is almost exclusively by limousine rather than by heavy buses. Sightseeing buses rarely use this or any other part of the Parkway above the Arlington Memorial Bridge.

Conclusions of Law

(1) The Court has jurisdiction over all claims and counterclaims except for the counterclaim of W. V. & M. in Civil Action No. 1172-63 for the return of fees in the amount of $2,284.16 which have already been paid for the use of the Parkway.

(2) Park Service Regulations requiring the present and future payment of fees of one cent per vehicle mile for use of the Parkway by suburban commuter buses are reasonable, within the authority of the Secretary of the Interior to promulgate, have been adopted pursuant to the inherent police powers of the Secretary to regulate and maintain a government-owned national park, and they apply equally to all buses of the same class and therefore are not discriminatory. Thus, the claims seeking injunctive relief or declaratory injunctive relief against the Secretary of the Interior and the Regional Director of the National Park Service restraining them from present and future collection of fees are without merit and the Secretary of the Interior and the Regional Director of the National Park Service will not be enjoined from collecting such fees for such present and future use of the Parkway by suburban commuter buses as may be permitted.

(3) With respect to the counterclaim of W. V. & M. in the first action (Civil Action No. 1172-63) for the return of

fees already paid, although the Court concludes that it has no jurisdiction over this counterclaim because it is a non-contractual money claim against the government without the government's consent to be sued, the Court also concludes, *assuming* it has jurisdiction, that the regulations pursuant to which these fees were paid were within the authority of the Secretary of the Interior to promulgate, they were adopted pursuant to the inherent police powers of the Secretary to regulate and maintain a government-owned national park, and they were applied equally to all buses of the same class and therefore they were not discriminatory. Thus, this counterclaim is without merit.

(4) The Act of September 15, 1960 (74 Stat. 1031, 1037), creating the Washington Metropolitan Area Transit Commission (the WMATC) with authority to issue certificates of public convenience and necessity and to prescribe routes with respect to transportation for hire by motor vehicles in the Washington Metropolitan District, did not revoke by implication or supersede the authority of the Secretary of the Interior to promulgate reasonable regulations with respect to administration and use of the George Washington Memorial Parkway.

(5) The issuance of a certificate of public convenience and necessity by the WMATC authorizing a route over the George Washington Memorial Parkway is not in itself sufficient to permit operations on the Parkway. Use of the Parkway pursuant to such certificate is conditioned upon compliance with reasonable regulations promulgated by the Secretary of the Interior regarding such use and it is also conditioned upon the reasonable exercise of discretion by the Secretary of the Interior through the National Park Service in issuing permits for such use according to such reasonable regulations.

(6) The National Park Service Regulations promulgated by the Secretary of the Interior are unreasonable, arbitrary, capricious, discriminatory, and therefore invalid,

insofar as they do not permit suburban commuter buses owned W. V. & M. and D. C. Transit to operate without limitation on the Parkway above the Key Bridge including the Spout Run section pursuant to their certificates from the WMATC. The regulations are unreasonable, arbitrary, capricious, discriminatory and therefore invalid insofar as, and so long as, other regulations do permit suburban commuter buses owned by other bus companies to operate without limitation of the Parkway below the Arlington Memorial Bridge.

(7) To the extent that the Park Service Regulations are unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, by allowing commuter buses to operate on the southern part of the Parkway but not on the portions above the Key Bridge, so, too, is any refusal of the Secretary of the Interior or any of his delegates, to issue permits to W. V. & M. and D. C. Transit for unlimited access to the Parkway above Key Bridge basing such refusal on such unreasonable, arbitrary, capricious, discriminatory, and invalid regulations.

(8) The claim of the United States in Civil Action No. 1172-63 for injunctive relief against W. V. & M. will be denied, and the claims of W. V. & M. and D. C. Transit seeking a declaration of invalidity as to the regulations which deny their suburban commuter buses unlimited access to the Parkway north of Key Bridge will be granted because such regulations are invalid and will be invalid *so long as* they remain unreasonably discriminatory by allowing commuter buses unlimited access to the Parkway below Arlington Memorial Bridge while denying unlimited commuter bus use of the Parkway above the Key Bridge.

(9) The National Park Service Regulations promulgated by the Secretary of the Interior which do not permit *any* suburban commuter buses to use that section of the Parkway between the Arlington Memorial Bridge and the Key Bridge are reasonable and valid because of structural weak-

ness and maintenance problems, but only *so long as all buses,* including sightseeing buses and airport buses (not including limousines), are similarly denied access. Accordingly, the claims of W. V. & M. seeking a declaration of invalidity as to the regulations which deny its suburban commuter buses any access to this portion of the Parkway will be denied.

(10) All parties shall bear their own costs.

/s/ JOHN J. SIRICA
United States District Judge

April 13, 1967

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed June 9, 1967]

C.A. Nos. 1172-63 and 2874-63

Order

These consolidated actions came on for trial without a jury, and upon consideration of all the oral testimony, documentary evidence, legal memoranda, the Court's Findings of Fact, Conclusions of law and Opinion filed herein on April 13, 1967, and also in consideration of the arguments of counsel upon proposed orders on May 19, 1967, it is by the Court, this 9th day of June, 1967,

ORDERED, ADJUDGED AND DECREED, in Civil Action No. 1172 63, that the Regulations of the National Capital Region, National Park Service, as amended December 30, 1959, and November 16, 1962, are discriminatory, invalid and inoperative insofar as they do not permit suburban commuter buses owned by the Washington, Virginia and Maryland Coach Company, Inc. and the D. C. Transit System, Inc. to operate without limitation on the George Washington Memorial Parkway in the State of Virginia above Key Bridge pursuant to their certificates from the Washington Metro-

politan Area Transit Commission. The regulations are discriminatory, invalid and inoperative insofar as, and so long as, suburban commuter buses owned by other bus companies are allowed to operate without limitation on the Parkway below the Arlington Memorial Bridge, an it is further

ORDERED that the request of the United States for an injunction and declaratory judgment against the Washington, Virginia and Maryland Coach Company, Inc. be, and the same hereby is denied, and it is finally

ORDERED that the request of the Washington, Virginia and Maryland Coach Company, Inc. for a refund of $2,284.16 be, and the same hereby is, denied.

And it is ORDERED, ADJUDGED AND DECREED, in Civil Action No. 2874-63, that the Regulations of the National Capital Region, National Park Service, as amended December 30, 1959, and November 16, 1962, are discriminatory, invalid and inoperative insofar as they do not permit suburban commuter buses owned by the Washington, Virginia and Maryland Coach Company, Inc. and the D. C. Transit System, Inc. to operate without limitation on the George Washington Memorial Parkway in the State of Virginia above Key Bridge pursuant to their certificates from the Washington Metropolitan Area Transit Commission. The regulations are discriminatory, invalid and inoperative insofar as, and so long as, suburban commuter buses owned by other bus companies are allowed to operate without limitation on the Parkway below the Arlington Memorial Bridge, and it is further

ORDERED that all requests for affirmative relief are denied.

/s/ JOHN J. SIRICA
United States District Judge

APPENDIX C

Act of August 25, 1916 (39 Stat. 535 as amended, 16 U.S.C. §§ 1, 3) which directs the Secretary of the Interior and the National Park Service to

> "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (16 U.S.C. § 1).

This Act also authorized the Secretary of the Interior to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." (16 U.S.C. § 3).

APPENDIX D

27 Fed. Reg. 11346,

2. Section 3.36(b) is amended to read as follows:

(b) *George Washington Memorial Parkway; passenger-carrying vehicles; permits, fees.* • • •

• • • • • • • •

(3) Passenger-carrying vehicles for hire or compensation, other than those to which subparagraphs (1) and (2) of this paragraph apply, may be permitted on the George Washington Memorial Parkway upon application for, and the granting of a permit by the Regional Director, National Capital Region, National Park Service under the following conditions:

(i) When operating on a regular schedule (*a*) to provide passenger service on any portion between Mount Vernon and the Arlington Memorial Bridge, (*b*) to provide limited direct nonstop passenger service from Key Bridge to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return, and (*c*) to provide limited direct nonstop passenger service from the interchange at Route 123 to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return. Permittees shall file a schedule of operation and all schedule changes with the office of National Capital Region showing the number of such vehicles and total miles to be operated on the parkway.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 658

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, INC. and D. C. TRANSIT SYSTEM, INC.,

Petitioners

v.

UNITED STATES OF AMERICA,
STEWART L. UDALL, Secretary of the Interior, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANUEL J. DAVIS
SAMUEL M. LANGERMAN
1420 New York Avenue, N. W.
Washington, D. C. 20005

Attorneys for Petitioners

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Cases:

A. T. & T. Co. v. United States, 292 U.S. 232 (1936) 18
Beard v. City of Alexandria, La., 341 U.S. 622 (1951) 10
Boske v. Comingore, 177 U.S. 459 (1900) 6, 9
Camfield v. United States, 167 U.S. 518 (1896) 9
Campbell v. Rankin, 99 U.S. 261 (1878) 12
Edwards v. California, 314 U.S. 160 (1941) 10
Mississippi Valley Barge Co. v. United States, 292 U.S. 282 (1934) 12
Robbins v. United States, 284 Fed. 39 (C.A. 8, 1922) 9

State of Tennessee v. United States, 256 F.2d 244 (C.A. 6, 1958) 9

Statutes:

Act of August 25, 1916
39 Stat. 535, 16 U.S.C. §§ 1, 3 ..... 4, 7, 11

Act of May 29, 1930
46 Stat. 482 ..... 11, 14

Act of August 8, 1953
67 Stat. 495, 16 U.S.C. § 1c 7

Act of September 15, 1960
74 Stat. 1031, D.C. Code (1967 Ed.) §§ 1-1410 to 1416 ..2, 6, 9

Miscellaneous:

Hearings on The 1957 Supplemental Appropriation Bill (Act of July 27, 1956, 70 Stat. 678) Before Subcommittees of the House Committee on Appropriations, 84th Cong., 2d Sess., Part 1 (1956) 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, INC. and D. C. TRANSIT SYSTEM, INC.,

Petitioners

v.

UNITED STATES OF AMERICA,
STEWART L. UDALL, Secretary of the Interior, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, Virginia and Maryland Coach Company, Inc. and D. C. Transit System, Inc. petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the District of Columbia Circuit which was entered on June 12, 1968.

OPINIONS BELOW

The opinion and order of the United States District Court for the District of Columbia are set forth in Appendix A, and the opinion of the Court of Appeals reversing the order of the District Court is set forth in Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1) and within the 90-day period prescribed at 28 U.S.C. § 2101(c). The opinion of the Court of Appeals was entered on June 12, 1968, and petitions for rehearing *en banc* were denied on August 5, 1968.

QUESTIONS PRESENTED

1. In administering the national park system does the Secretary of the Interior have authority to regulate activities performed outside the parks?

2. Is the affidavit of the Secretary of the Interior, which had not been introduced in evidence at the trial, a proper basis for the Court of Appeals to reverse the findings of the District Court?

3. Is there any rational basis in the evidence of record for the involved regulations of the Secretary of the Interior?

STATUTES INVOLVED

The primary statutes involved are the Washington Metropolitan Area Transit Regulation Compact, as approved by Act of September 15, 1960, 74 Stat. 1031, D.C. Code (1967 Ed.) §§ 1-1410 to 1416, and the acts providing for the administration of the national park system by the Secretary of the Interior. Relevant portions of these statutes are printed in Appendix D.

STATEMENT OF THE CASE

The first of the two complaints consolidated herein was initiated by the United States in the United States District Court for the District of Columbia to enforce against the Washington, Virginia and Maryland Coach Co., Inc. ("W. V. & M.") regulations of the Secretary of the Interior ("Secretary") governing commercial use of the George Washington

Memorial Parkway ("Parkway"). The District Court's jurisdiction over this action was based on the provisions of 28 U.S.C. § 1345. D. C. Transit System, Inc. ("Transit"), the Washington Metropolitan Area Transit Commission ("Commission"), and the State Corporation Commission of the Commonwealth of Virginia intervened as defendants.

The second complaint, brought by W. V. & M. to invalidate the Secretary's regulations, involves substantially the same issues and parties, with the Secretary and the Director of the National Park Service ("Service") being named in place of the United States. The District Court's jurisdiction over this action was based on the provisions of 28 U.S.C. §§ 2201 and 2202.

In an opinion filed April 13, 1967, and an order filed June 9, 1967, the District Court found the Secretary's regulations invalid insofar as they arbitrarily discriminate against W. V. & M. and Transit. The United States, the Secretary, and the Director of the Service thereafter appealed to the United States Court of Appeals for the District of Columbia. By decision of June 12, 1968, a three-judge panel of the Court of Appeals (one judge dissenting) reversed the findings of the District Court, concluding that the Secretary's discrimination in the use of the Parkway has a reasonable basis in the record. The commissions, jointly, and the carriers, jointly, filed separate petitions for rehearing *en banc*, both of which were denied on August 5, 1968.

The Parkway is a strip of Federal land running between Mount Vernon and the Capital Beltway in Virginia. It is, at one and the same time, a beautiful scenic area following the contour of the Potomac River and an interstate highway on which commuter traffic during the daily rush hours is frequently bumper to bumper (JA 124-25, 173, 189, 192; W. V. & M. Exs. 37 and 38).[1]

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[1] All references to JA are to the Joint Appendix filed with the Court of Appeals and included in the certified record transmitted to this Court.

From a structural standpoint, the section of the Parkway between Key Bridge and Arlington Memorial Bridge does not have the subsurface strength that underlies the other sections. It is therefore subject to constant cracking from seepage as well as the stresses of heavy traffic and has been a maintenance problem (JA 108-09, 190-91, 221; Gov't Exs. 15-21).

Commercial use of the Parkway is regulated by the Secretary, through the Service, pursuant to the Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. §§ 1, 3 (App. D, p. 49). Regulations adopted by the Secretary on November 16, 1962 contain the following relevant provisions (36 C.F.R. 50.36, reproduced in Appendix E):

> 1. Taxicabs and sightseeing buses are permitted on any portion of the Parkway.
>
> 2. Regularly scheduled commuter buses are permitted on the Parkway between Mt. Vernon and Arlington Memorial Bridge (the southern portion) and between Key Bridge and Virginia Route 123 (the northern portion). A restriction imposed on service operated over the northern portion requires a "direct return" upon leaving the Central Intelligence Agency Building ("CIA"), thereby prohibiting service to communities adjacent to the Parkway.
>
> 3. Airport buses are permitted on the Parkway between Washington National Airport and Virginia Route 123.

The following bus operations are being performed on the Parkway with permits issued by the Service:

Commuter Buses

The Alexandria, Barcroft and Washington Transit Company ("A. B. & W.") performs daily scheduled operations over the Parkway between Mt. Vernon and Arlington Memorial Bridge, providing commuter service to the adjacent communities, as much as 6 miles away, of Alexandria, Belle View, Bucknell Manor, and Orleans Village (JA 138-39, 236). A. B.

& W. operates a total of 820 one-way trips per day over this southern portion of the Parkway (JA 244).

W. V. & M. performs daily scheduled operations over the Parkway between Key Bridge and Virginia Route 123 in serving the CIA at Langley, Virginia. Upon leaving the CIA, in violation of its permit, W. V. & M. operates over Virginia Highway 123 to provide commuter service to nearby McLean, Tyson's Corner and Vienna (JA 116-17, 122). W. V. & M. operates 52 one-way trips per day over this northern portion of the Parkway (JA 121).

Sightseeing Buses

The Gray Line, White House Sightseeing Corporation ("White House"), and A. B. & W. perform extensive sightseeing operations on the Parkway, using the southern portion almost exclusively (JA 132-34, 144, 168-69). During the period January 1 to October 31, 1966, for example, Gray Line and A. B. & W., combined, operated some 1800 sightseeing trips thereover (JA 269, 275).

Airport Buses

Airport Transport, Inc., performs daily non-scheduled operations over both the northern and southern portions of the Parkway for the convenience of airline passengers using Washington National and Dulles airports (JA 127, 130). Airport Transport operates 98 one-way trips daily over just the northern portion (JA 130-31).

The CIA itself performs a daily scheduled shuttle service for its employees over the northern portion of the Parkway, operating 52 one-way bus trips per day (JA 134-35, 235).

The described commuter, sightseeing, and airport operations are being performed with similar buses, generally about 20,000 pounds in weight, 96 inches in width and 35 to 40 feet in length (JA 119-20, 129, 143, 197, 233, 246, 274).

In addition to permits from the Service, the described commercial operations required certification by the Com-

mission in accordance with the Washington Metropolitan Area Transit Regulation Compact ("Compact"), Act of September 15, 1960, 74 Stat. 1031, D.C. Code (1967 Ed.) §§ 1-1410 to 1416 (App. D, pp. 44-48).[2] Under Articles I and II of the Compact the Commission has been given jurisdiction over the Metropolitan District (the District of Columbia and nearby counties in Maryland and Virginia, including all of the Parkway) for the regulation and improvement of transit and the alleviation of traffic congestion. Section 3 of the Act of 1960, 74 Stat. 1050, D.C. Code § 1-1412, however, specifically preserves the "normal and ordinary police powers of the . . . Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities".

REASONS FOR GRANTING THE WRIT

In their joint briefs filed with the District Court and the Court of Appeals, W. V. & M. and Transit have argued that the Secretary's regulations of November 16, 1962 exceed his statutory authority. The District Court agreed with this argument, quoting from *Boske v. Comingore,* 177 U.S. 459, 470 (1900):

> the Court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the Act of Congress. (App. A, p. 17.)

Without any consideration whatsoever of this basic denial of the Secretary's statutory authority, a divided panel of the Court of Appeals has decided in effect that the Secretary, as the caretaker of the national parks and parkways, is authorized to regulate activities performed after leaving the parks and parkways. This unmeditated decision represents

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[2]The Commission has also authorized Transit to operate on the Parkway between the Capital Beltway and the CIA but the Service has refused to permit such operations (JA 276-91).

the first judicial recognition of any such statutory authority and, in view of its far-reaching negative implications on freedom of movement, particularly in interstate commerce, raises an "important question of federal law which has not been, but should be, settled by this court".[3]

A review by this Court is further warranted under Rule 19 by the Court of Appeals' drastic departure from the accepted and usual course of judicial proceedings, having based its decision primarily on an affidavit not introduced in evidence.

1. The Secretary's Regulations Exceed His Statutory Authority.

The regulations of November 16, 1962, have been prescribed pursuant to the authority conferred on the Secretary by the Act of August 25, 1916, 16 U.S.C. § 3 (App. D, p. 49), which provides in part:

> The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service.[4]

The statute is thus quite clear in requiring all regulations of the Secretary to be related to the "use and management" of the national park system.

Such "use" is fully described in the Act of 1916 as follows (16 U.S.C. § 1, App. D, p. 49):

> There is created in the Department of the Interior a service to be called the National Park Service. . . The service thus established shall promote and regulate the use of the Federal areas known as national

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[3] Rule 19 of this Court.

[4] National parkways are embraced by such jurisdiction under the Act of August 8, 1953, 67 Stat. 495, 496, 16 U.S.C. § 1c (App. D, p. 50).

> parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, *which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.* (Emphasis added)

In short, the "use" of the parks is intended by the Congress to be in conformity with the "purpose" of conserving the scenery and natural beauty of the land for present and future enjoyment.

It is submitted that there is no reasonable relationship or plain consistency between the Secretary's regulations and this Congressional purpose. To illustrate, W. V. & M.'s commuter buses operate to McLean, Tyson's Corner, and Vienna over Virginia Highway 123 after leaving the Parkway to serve the CIA. Can these buses possibly constitute any menace to the Parkway's scenery while they are conducting operations several miles away? Can these buses possibly injure the natural beauty of the Parkway to any different degree while they are performing the unauthorized service to these Northern Virginia communities than while they are performing the authorized service to the CIA? The effect of W. V. & M.'s commuter operations on the scenery and natural beauty of the Parkway is obviously the same whether its buses terminate at the CIA or go beyond, over state roads, to nearby communities.[5]

As a practical matter, it would seem that the Secretary himself has demonstrated that W. V. & M.'s operations over

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[5]On page 8 of its opinion (App. B, p. 39) the panel majority suggests that the 52 daily trips which W. V. & M. is now operating over the Parkway in commuter service might well become several hundred if sanctioned by the Secretary. This would not seem likely, as the public demand for such service, which determines the frequency of operations, has remained almost unchanged since July 1, 1964. (See W. V. & M. Exhibit No. 34, JA 218.)

the Parkway have no harmful effect on the scenery and beauty thereof. By permitting A. B. & W.'s buses to operate 820 one-way trips in daily commuter service, the Secretary has recognized that commuter operations do not impair the scenery and beauty of the southern portion of the Parkway. In view of the similarity of the equipment used and the much smaller frequency of service, can the Secretary, at the same time, reasonably conclude that the 52 one-way trips operated daily by W. V. & M. have an entirely different effect on the northern portion of the Parkway? It would seem not.

The Secretary's proscription of operations performed off the Parkway is so patently unrelated to the intended use and purpose of the Parkway that he has clearly "exceeded his authority and employed means that are not at all appropriate to the end specified in the Act of Congress."[6]

The unauthorized aspect of the Secretary's regulations is further evidenced by reference to the Act of September 15, 1960, 74 Stat. 1050, D.C. Code § 1-1412, establishing the regulatory jurisdiction of the Commission over the Metropolitan District and suspending the applicability of the laws of the United States. Congress therein specifically preserved the "normal and ordinary police powers" of the Director of the Service.

It would seem clear that the term "police powers" should be interpreted as including the full scope of the pre-existing authority delegated by the Congress to the Secretary to make rules and regulations for the administration of property of the United States, the national parks and parkways. *Camfield v. United States,* 167 U.S. 518, 525 (1896); *State of Tennessee v. United States,* 256 F.2d 244, 258 (C.A. 6, 1958); *Robbins v. United States,* 284 Fed. 39, 45 (C.A. 8, 1922). However, such term surely did not confer upon the Secretary any greater authority than that delegated to him by the Act of 1916. It merely emphasized the Congres-

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[6] *Boske v. Comingore, supra,* 177 U.S. 459, 470.

sional intent to limit the authority of the Secretary to activities occurring on the Parkway; for the exercise of police powers has been traditionally limited to matters arising within the physical borders of the jurisdiction. *Beard v. City of Alexandria, La.*, 341 U.S. 622 (1951); *Edwards v. California*, 314 U.S. 160 (1941).

In the final analysis, to the extent the Secretary's regulations proscribe activities which are performed entirely off the Parkway, the Secretary has exceeded the scope of his statutory authority as described in the Act of 1916 and as preserved in the Act of 1960.

The Court of Appeals completely ignored this statutory question.

2. The Court of Appeals Improperly Based Its Reversal of the Findings of the District Court upon Facts Not in Evidence.

Early in this litigation, the Secretary filed an affidavit in support of a pre-trial motion of the Government for summary judgment (App. C). The motion was denied and the affidavit was not subsequently introduced into evidence. The District Court therefore determined that it could not consider the affidavit. (App. A, p. 13) The Government never challenged this determination in its appeal to the Court of Appeals.

Notwithstanding these circumstances, the Court of Appeals has placed primary reliance on the Secretary's affidavit in reversing the decision of the District Court. The following extract is taken from pages 5 and 6 of the opinion of the Court of Appeals (App. B, pp. 36-37):

> In essence the trial judge felt that the regulations were discriminatory and invalid for two reasons: first, because they unreasonably allow unlimited bus service south of Memorial Bridge while limiting such service north of the Bridge; and second, because they allow sightseeing, airport and CIA Building buses

north of Key Bridge while prohibiting general commuter service on this section of the Parkway.

The Secretary explained his reasons for the regulations in an affidavit in support of the United States' motion for summary judgment. He felt that the use of the Parkway by "ever increasing numbers of commuter buses with their great bulk, trucklike characteristics, and odors, as is contemplated by the Washington, Virginia & Maryland Coach Company, would, in my opinion, physically damage the scenic value of the Parkway."

The trial judge, however, concluded that the Secretary's regulations were not reasonably related to his goal of preserving the scenic value of the Parkway. For he felt that the southern sector of the Parkway was more scenic than the northern sector and consequently to allow unlimited traffic on the southern sector, while prohibiting it to the north, was unreasonable. He felt also that, because the CIA Building, airport and sightseeing buses were physically identical with the WV & M buses, to bar the latter on the northern sector of the Parkway, while permitting the former, was unreasonably discriminatory. He emphasized that he could not "understand how 52 suburban commuter buses operated by W. V. & M. could be aesthetically objectionable when approximately 200 airport and C.I.A. commuter buses * * * are not aesthetically objectionable." 268 F.Supp. at 44.

The Secretary, however, did not find that only WV & M buses were unsightly. In his affidavit he "reluctantly" concluded, "after weighing the interest of the public in retaining the present natural beauty of the Parkway and its environs[6] as against the compelling necessity to provide CIA employees swift and

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[6]The Secretary pointed out in his affidavit that Congress had expressed its concern "that the scenery and natural objects found on the George Washington Memorial Parkway * * * be conserved * * *," citing act of May 29, 1930 (46 Stat. 482), and act of August 25, 1916 (39 Stat. 535), as amended (16 U.S.C. § 1).

> immediate access to their Agency," that direct commercial transportation to the CIA Building should be permitted on the Parkway. Similar considerations prompted his decision with regard to the use of the Parkway for access to Dulles International Airport. . .

The Court of Appeals' consideration of the Secretary's affidavit is clearly contrary to the decision of this Court in an analogous case. In *Campbell v. Rankin*, 99 U.S. 261, 264 (1878), this Court held that an affidavit in support of a pre-trial pleading was in no judicial sense before the Court on the trial and could only be used, if at all, when introduced by one of the parties for some legitimate purpose.

3. The Secretary's Regulations Constitute an Arbitrary and Discriminatory Exercise of His Statutory Authority

Both the District Court and the panel majority aptly put the question respecting the reasonableness of the Secretary's regulations into proper perspective by reference to the following guideline:

> The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Miss. Valley Barge Co. v. United States*, 292 U.S. 282, 286-287 (1934).

From this common point of departure two different conclusions were reached: The District Court found that "while searching the facts and circumstances of this case to find a rational basis for the regulations, just the contrary has become clear to the Court" (App. A, p. 16). The panel majority found that the "Secretary's discrimination in the use of the Parkway has a reasonable basis in the record" (App. B, p. 39). It is respectfully submitted that the evidence of record admits only the first conclusion, as expressed by Judge Tamm in his dissent:

> . . . the Secretary's justification constitutes an army of words escorting a modicum of reason. His action is nothing more than arbitrary bureaucracy masquerading as reasoned judgment. (App. B, p. 40.)

Two separate explanations have been given for the Secretary's regulations. First, it is contended that the regulations are necessary to preserve the scenery and natural objects found along the Parkway. Second, it is contended that the northern and southern portions of the Parkway are treated differently because the Parkway historically has been a commuter highway between Mt. Vernon and Arlington Memorial Bridge and a scenic highway between Key Bridge and the Capital Beltway. Closely scrutinized, each of these aesthetic and historic "reasons" is revealed to be completely unreasonable.

Beginning with the aesthetic "reason", the panel majority has found the rational basis therefor existing entirely in an affidavit of the Secretary (App. C). As noted in Argument No. 2 herein, this affidavit was not introduced into evidence and should not have even been considered by the panel majority. From a practical standpoint, however, the affidavit provides little if any rationale for the Secretary's regulations. Most of the statements therein are merely self-serving expressions of opinions rather than facts and are applicable equally as well to both portions of the Parkway. No opportunity was afforded counsel to cross-examine the Secretary on such expressions, and no independent corroborating evidence was introduced by persons familiar with the scenic values of the Parkway.

Moreover, most of the statements therein are misleading. To illustrate, the Secretary states that the Parkway "abounds in natural beauty and affords the people of the Washington Metropolitan Area a panorama of unsurpassed scenic splendor. Observation stations have been established along the Parkway where motorists may stop in the course of their travels and derive some benefit from the natural beauties which surround our Nation's Capital." The implication here

is that the Parkway is an idyllic backwoods road fairly insulated from heavy automobile traffic. While it may be a beautiful scenic area, the Parkway from Mt. Vernon to the Capital Beltway is also a primary multi-lane highway for Maryland, Virginia, and D. C. commuter traffic, often bumper to bumper during rush hours. As noted by the District Court (App. A. p. 18):

> [t]he motion pictures which are in evidence amply support a finding of which the Court could take judicial notice anyway; that however one might view it, the Parkway is an extremely heavily travelled commuter highway. To the thousands of commuters who use it and to the officials who must regulate it, it is not a scenic parkway during weekday rush hours and no amount of wishful thinking can make it so. . .

Under these circumstances, commuters using the Parkway daily, whether the northern or southern portion, have absolutely no opportunity to enjoy its "unsurpassed scenic splendor".

The Secretary then refers to the Act of May 29, 1930, 46 Stat. 482, 483, as representing an expression of Congressional concern for the conservation of the scenery and natural objects found on the Parkway. In authorizing the initial purchase of Parkway land, this Act of 1930 also specifically provided that the "acquisition of any land in the Potomac River Valley for park purposes shall not debar or limit, or abridge its use for such works as Congress may in the future authorize for the improvement and the extention of navigation . . . or for flood control or irrigation or drainage, or for the development of hydroelectric power." From the very beginning, then, Congress has emphasized that the preservation of the scenic beauty of this area along the Potomac River is compatible with its use for other public purposes.

One such purpose, public transportation, was highlighted in the hearings preceding the appropriation of funds for the construction of the Parkway from Spout Run to the CIA.

At such hearings, Director Dulles underscored the need of the CIA employees commuting to work for "[p]ublic transportation . . . supplied by the bus lines serving the general area".[7] It would seem clear therefore that W. V. & M.'s use of the northern portion of the Parkway to provide commuter service to nearby communities in Northern Virginia was fully contemplated and approved by the Congress.

The Secretary's next statement apparently contains the gravamen of his complaint, indicating that:

> . . . it would be contrary to the public interest to allow permanent commuter bus service upon the [Parkway] for the purpose of transporting passengers between the Virginia suburbs and the District of Columbia. The use of this Parkway by ever-increasing numbers of commuter buses with their great bulk, trucklike characteristics, and odors, as is contemplated by [WV&M], would, in my opinion, physically damage the scenic value of the Parkway.

This statement of opinion is entirely unsupported by any evidence of record that commuter buses damage the scenery of the Parkway. Granted that such buses are bulkier and heavier than automobiles, are such physical characteristics aesthetically objectionable *per se*? The District Court quite properly answered this question in the negative (App. A, p. 12). Furthermore, the very fact that commercial buses are allowed on other scenic lands administered by the Service is convincing evidence that they cause no obvious physical damage to the scenery thereof (36 C.F.R. §§ 5.4 and 6.3).

Although, in passing, it might have been argued that commercial buses physically damage the surface of the Parkway, as opposed to its scenery, the Secretary has made

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[7]Hearings on The 1957 Supplemental Appropriation Bill (Act of July 27, 1956, 70 Stat. 678) Before Subcommittees of the House Committee on Appropriations, 84th Cong., 2d Sess., Part 1, p. 255 (1956). See also pages 247, 273, and 304 thereof cited on page 7 of the Opinion (App. B, p. 38).

no such argument except as to the portion of the Parkway between Arlington Memorial and Key bridges.

Respecting the Secretary's reference to "odors," there is no evidence of record that commercial buses are odoriferous generally, that W. V. & M.'s buses are odoriferous in particular, or that W. V. & M.'s buses produce more or different "odors" than the physically identical buses operated by A. B. & W., Airport Transport, White House, Gray Line, and the CIA itself. Additionally, there is no evidence of record that W. V. & M.'s 52 buses are more odoriferous than the thousands of automobiles permitted to use the Parkway daily.

Finally, the Secretary's reference to the "ever-increasing" numbers of commuter buses is inaccurate. As shown on W. V. & M. Exhibit No. 34 (JA 218), commuter bus operations by W. V. & M. between July 1, 1962 and December 31, 1963, the only period for which the Secretary had information at the time of his affidavit, stayed at a fixed level of approximately 10,500 miles per quarter. While this figure grew to approximately 16,000 miles by the last quarter of 1964, no subsequent increase has occurred and none is anticipated.[8]

In short, there is absolutely no evidentiary support for the Secretary's opinion that commuter buses physically damage the scenic value of the Parkway. Moreover, even assuming *arguendo* that commuter buses do such damage, the Secretary has still acted arbitrarily in applying the "public interest" factor to only the northern portion of the Parkway and not the southern portion where A. B. & W. is daily allowed to operate over 800 one-way trips in "permanent commuter bus service . . . between the Virginia suburbs and the District of Columbia". Surely, a commuter bus operated by A. B. & W. between Mt. Vernon and Arlington Memorial Bridge

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[8]W. V. & M. Exhibit No. 49 (JA 240-43) details the fixed nature of the mileage operated by A. B. & W. in commuter service on the southern portion of the Parkway.

does as much physical damage to the scenic value of the Parkway as a similar bus operated by W. V. & M. between Key Bridge and Virginia Route 123.

One other statement in the Secretary's affidavit warrants passing comment. The Secretary states that "other routes are available for transportation of passengers between the District of Columbia and the suburbs of Northern Virginia." Presumably, reference here is to Virginia highways 123 and 193 which are alternate routes for the Parkway between the CIA and, respectively, Key Bridge and the Capital Beltway. The mere presence of an alternate route, however, does not make it a desirable route. In connection with Highway 193, for example, the Commission found that "the Parkway offers the most direct and shortest route, the fastest and most efficient service, and just as important, the safest route. Highway 193 is a narrow two-lane road, and its intersection with Interstate 495 raises hazards not present on the Parkway route" (JA 285-86). Additionally, on the Secretary's theory, U. S. 1 would provide an appropriate alternate route for A. B. & W.'s commuter buses operating on the southern portion of the Parkway.

In light of the foregoing, it is submitted that the Secretary's regulations of November 16, 1962 cannot be rationalized on an aesthetic basis. As noted by the District Court in this connection (App. A, p. 16):

> [t]he Court cannot understand how 52 daily suburban commuter buses operated by W. V. & M. could be aesthetically objectionable when approximately 200 airport and C.I.A. commuter buses of the same style and size, operating over the same route, are not aesthetically objectionable. Second, the Court cannot understand how the government can, in good faith, request injunctive relief against these 52 daily bus trips when the Park Service allows more than 800 daily trips below Memorial Bridge by buses with identical physical characteristics and performing an identical service. Even without more, these facts establish the allegations that the regulations lack a

rational basis and that they are discriminatory, unreasonable and therefore invalid.

Turning now to the historic "reason" given for the Secretary's regulations, the panel majority focused upon testimony that the southern portion of the Parkway has been developed as a commuter highway and the northern portion has been developed as a scenic highway. (Testimony of Robert C. Horne, Associate Regional Director of the Capital Region of the Service, JA 160-61, 172-73). The implication here is that the Parkway is really two separate roads used for two entirely different purposes.

This historical rationalization is "so entirely at odds" with reality "as to be an expression of a whim rather than an exercise of judgment". *A. T. & T. Co. v. United States*, 292 U.S. 232, 236 (1936). A mere look at the map introduced in evidence by W. V. & M. (JA 192) refutes the existence of any physical separation or distinction between the northern and southern ends of the Parkway. More significantly, the use made of the so-called commuter portion is as much scenic in nature as that made of the so-called scenic portion. Conversely, the use made of the so-called scenic portion is as much commuter in nature as that made of the so-called commuter portion.

To illustrate, between January 1 and October 31, 1966, Gray Line and A. B. & W. alone were issued over 1800 one-day sightseeing permits for tours conducted over the "commuter" portion of the Parkway (JA 144-46, 170-71, 269 and 275). Furthermore, the Service issued over 1600 one-day sightseeing permits at Mt. Vernon during just the two months of June and November, 1965 (JA 124, 216-17).

The panel majority suggests that this sightseeing traffic on the southern portion of the Parkway may be attributable to an interest in historic sites rather than in scenic beauty (Opinion, page 5, note 5, App. B, p. 36). It is respectfully submitted that the millions of persons annually visiting Mt. Vernon and Arlington National Cemetery are greatly attracted, in the words of the Secretary's affidavit describing

the natural beauty along the Potomac River in Virginia, by the "panorama of unsurpassed scenic splendor" (JA 14).

As for the northern or "scenic" portion of the Parkway, the bumper to bumper rush-hour traffic shown in the motion pictures introduced in evidence (W. V. & M. Exs. 37 and 38, JA 219) readily substantiates that this portion is a heavily traveled commuter highway. It is also significant that W. V. & M., Airport Transport, and the CIA operate some 200 one-way commuter trips daily, while sightseeing buses operate rarely, over this "scenic" portion of the Parkway (JA 121, 130-31, 134-35).

In short, the very use being made of the Parkway negates any historic rationalization of the Secretary's regulations.

In concluding, the most striking example of the objectivity and validity of the review by the District Court is found in connection with the portion of the Parkway between Arlington Memorial and Key bridges. Evidence was introduced concerning structural deficiencies in the roadway which make this portion unsuitable for heavy bus traffic. The District Court concluded that such evidence "demonstrated a rational basis" for prohibiting the operation of commuter buses thereover (App. A, p. 19). It would seem quite clear therefore that to the extent a sound reason was given for any aspect of the Secretary's regulations the District Court readily recognized such fact.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

WASHINGTON, VIRGINIA & MARYLAND COACH COMPANY, INC.,
Defendant

and

D.C. TRANSIT SYSTEM, INC., WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
and
VIRGINIA STATE CORPORATION COMMISSION,
Intervenors-Defendant

Civil Action No. 1172-63

WASHINGTON, VIRGINIA & MARYLAND COACH COMPANY, INC.,
Plaintiff,

and

D.C. TRANSIT SYSTEM, INC.,
Intervenor-Plaintiff,

v.

STEWART UDALL, Secretary of the Interior, et al.,
Defendants.

Civil Action No. 2874-63

CONSOLIDATED

OPINION

This litigation involves a complex factual background and numerous legal issues; however, one issue stands out as paramount. That issue is whether the Secretary of the Interior through his delegate, the Director of the National Park Service, has discretionary power to limit suburban commuter bus traffic on part of the George Washington Memorial

Parkway while not limiting such traffic on other parts of the Parkway. This litigation involves only those parts of the Parkway which are on the Virginia side of the Potomac River. Included in this issue is whether the Secretary has exercised his discretion in a reasonable and non-discriminatory manner under the circumstances and whether the Secretary has the authority to exact a fee from suburban commuter bus companies for such use of the Parkway as is permitted.

Annexed hereto as Appendix A is a map showing most of the Parkway. Included are the sections of the Parkway which are involved in this litigation, the site of the Central Intelligence Agency (C.I.A.), and all bridges, access roads and intersecting roads which shall be referred to in this opinion.

Also annexed hereto as Appendix B are detailed Findings of Fact and Conclusions of Law.

PLEADINGS AND PARTIES

The first of these two consolidated actions was initiated by the United States, requesting injunctive relief against the Washington, Virginia & Maryland Coach Company, Inc. (W.V. & M.), restraining it from continuing its unauthorized operation of a suburban commuter bus service over the Parkway between the Key Bridge and the C.I.A. site, the newest section of the Parkway. The United States complained that W.V. & M. only has limited permission to use the Parkway—to carry passengers to and from the C.I.A.—and therefore it is violating Park Service Regulations by adding a wide network of commuter service to and from areas of northern Virginia beyond the C.I.A. Building and by routing this commuter traffic onto the Parkway. The government contends that W.V. & M.'s use of the Parkway is substantially more extensive under its unauthorized use than it would be if the Parkway were used only as authorized to serve the C.I.A. and direct return to Key Bridge. The government asserted that the regulations which grant to suburban commuter buses only limited access to the

Parkway above Key Bridge are reasonable and necessary to preserve the scenic values of the Parkway.

In answer to this complaint, W. V & M. denied the validity of the regulations upon which the United States requested this injunctive relief, claiming that the regulations are discriminatory in that they permit all buses except suburban commuter buses to use this portion of the Parkway in connection with services rendered off the Parkway, and by permitting all kinds of buses, including suburban commuter buses, to use the portion of the Parkway below the Arlington Memorial Bridge in connection with services rendered off the Parkway. The government's contention that suburban commuter buses detract from the Parkway's scenic values was answered by a denial that such buses have any noticeable effect upon prevailing aesthetic standards on the Parkway, and that even if there is such an effect it would still be unreasonable and discriminatory to insist on the preservation of scenic standards on the Parkway above Key Bridge but not below the Arlington Memorial Bridge, W. V. & M. also counterclaimed for a return of fees paid under protest to the National Park Service of one cent per vehicle mile. These fees, for prior use of the Parkway, amounted to $2,284.16 at the time of trial.

The D.C. Transit System, Inc., the parent corporation of W. V. & M., intervened as a defendant. Also intervening as defendants were the Washington Metropolitan Area Transit Commission (hereinafter referred to as the WMATC) and the State Corporation Commission of the Commonwealth of Virginia (hereinafter referred to as the Virginia State Commission). Although limited, the interventions of the two commissions was for the purpose of joining with the bus companies in emphasizing the legislative aspects of this litigation. The legislative element in this case concerns the issue of whether the act of September 15, 1960, (74 Stat. 1031) authorizing The Washington Metropolitan Area Transit Regulation Compact has any effect upon the powers and authority of the Secretary of the Interior or the Na-

tional Park Service to regulate the kind and amount of suburban commuter bus traffic on the Parkway. The interests and contentions of the commissions and D.C. Transit are substantially identical with those of W. V. & M.

The second suit, brought by W. V. & M., raised substantially the same issues with three minor additions: first, W. V. & M. sought review of Park Service Regulations to the extent that they do not permit suburban commuter buses to travel on the Spout Run "neck" of the Parkway (a short deviation from the main Parkway route northwest of Key Bridge into Arlington proper), and between Key Bridge and Memorial Bridge (Route 50); second, W. V. & M. requested that the Secretary and the Park Service be enjoined from collecting fees for any use of the Parkway by commuter buses; and, third, D.C. Transit intervening as plaintiff sought review of Park Service Regulations to the extent that such regulations do not permit suburban commuter buses to use the northernmost part of the Parkway from the Beltway southward to the C.I.A., a stretch of about two miles. D.C. Transit presently carries suburban commuters from Maryland, who work at the C.I.A., across the Potomac River via the Cabin John Bridge on the Beltway (Interstate Route 495). Because present regulations preclude D.C. Transit from using the two-mile "shortcut" on the Parkway from the Beltway to the C.I.A., a longer and more indirect route must be taken by continuing west on the Beltway past the entrance to the Parkway, on to Route 193, then doubling back on Route 193 to the other C.I.A. entrance.

The parties are slightly different in the second suit. Rather than the United States, the Secretary of the Interior and the Director of the National Park Service were named as defendants. The WMATC and the Virginia State Commission were named defendants in the second action although the positions taken by them are almost identical with those taken by the plaintiff bus companies. Whatever procedural advantages may have been obtained by naming

the two commissions as defendants in the second suit, the Court will now treat both bus companies and both commissions as being aligned on the same side against the United States, the Secretary of the Interior, and the Director of the National Park Service.

BACKGROUND AND FACTUAL SUMMARY

The Parkway is owned and controlled by the Federal Government. In Virginia it consists of an elongated national park running parallel to the bank of the Potomac River with a multi-lane highway as its most distinctive feature. From Mount Vernon, at its southern end, it stretches northwestward through Fairfax County, the City of Alexandria, Arlington County, and again, Fairfax County, Virginia. On its northwestern end it terminates at Interstate Route 495, the circumferential highway which forms a beltway around the major portions of the Washington metropolitan area.

For purposes of this litigation the Parkway has been referred to by various sections according to the sequence in which it was constructed. First, there is the southeastern part running from Mount Vernon through the City of Alexandria, past the National Airport, and terminating at the Arlington Memorial Bridge (Route 50). This part of the Parkway was once known as the "Mount Vernon Memorial Highway" and was completed in 1932. The Parkway above the Arlington Memorial Bridge was added section by section. In 1937, a short stretch was completed between Memorial Bridge and Key Bridge. In December 1950, the "Spout Run" section of the Parkway was completed. This section runs northwestward from Key Bridge but after less than one mile it deviates southwestward, away from the Potomac River and goes into Arlington proper.

The final stretch of the Parkway was completed in early 1960. It begins where the Spout Run portion deviates away from the Potomac, and continues northwestward along the Potomac Gorge, terminating at the Beltway.

The building which houses the Central Intelligence Agency was completed and opened in the fall of 1961. The C.I.A. site is adjacent to the Parkway, about two miles southeast of where the Parkway terminates at the circumferential highway. The C.I.A. site is served with an access road to and from the Parkway. The C.I.A. site is also served on its opposite side by State Routes 123 and 193, which join when they reach the C.I.A. site and continue toward Washington as Route 123. Going toward the District of Columbia and after passing the C.I.A. site, Route 123 goes over the Parkway at a clover-leaf intersection below the C.I.A. site and continues southeastward between the Parkway and the Potomac, connecting with Chain Bridge into the District of Columbia.

The National Park Service views the various sections of the Parkway differently with reference to what kind of commercial traffic will be permitted. Taxicabs are permitted to travel on any portion of the Parkway without payment of any fee. Commercial trucks are not permitted on any part of the Parkway except in special cases and consequently there is no general provision for fees as to them.

With respect to commercial buses, however, use of the Parkway depends on two factors: what kind of service the buses render, and what portion of the Parkway is involved. First, as to the kind of service rendered, sightseeing buses, and airport buses serving Dulles and National Airports, are permitted on any portion of the Parkway which is desired and needed for those particular services subject to obtaining a permit and paying a fee. There are also buses owned by the Federal Government which are used as a shuttle service between the C.I.A. and points in downtown Washington. These government-owned buses are permitted on the Parkway south of the C.I.A. without payment of a fee and in this respect are given more favored treatment than buses of W. V. & M. which are permitted the same use of the Parkway from Key Bridge to the C.I.A., but contingent upon payment of a fee of one cent per vehicle mile. Park Serv-

ice Regulations prohibit W. V. & M. (or *any* suburban commuter bus company) from going beyond the C.I.A. to serve suburban residents in outlying northern Virginia, and, thus, these "C.I.A. commuter buses" operated by W. V. & M. are to be distinguished from "suburban commuter buses." In reality, therefore, any bus company (Such as W. V. & M.) which operates on the Parkway to and from the C.I.A. under this special regulation, is merely operating a shuttle service for the benefit of the C.I.A. and its employees in competition with, and identical to, the government-owned shuttle service.

The second distinction made by Park Service Regulations deals only with "suburban commuter buses." Rather than depending on the kind of service which a bus renders, this distinction is based on different parts of the Parkway. For example, commuter buses which actually carry passengers between downtown Washington and points in residential areas of suburban Virginia ("suburban commuter buses") are allowed unlimited use of the Parkway only on the southern part between Memorial Bridge and Mount Vernon. Such buses, regardless of what company owns them, cannot operate above Memorial Bridge except for the limited "C.I.A. commuter service," without violating Park Service Regulations.

Simply stated, the regulations appear to discriminate against suburban commuter bus companies desiring to use the Parkway to serve the northern section of suburban Virginia. This is the basic complaint of the bus companies in this litigation. They want the restrictive regulations declared invalid, including the provisions which require the payment of a fee for such use of the Parkway as is not permitted or will in the future be permitted.

A few statistics will demonstrate the difference in treatment accorded suburban commuter bus companies desiring use of the Parkway above the Memorial Bridge when contrasted with the treatment accorded other bus companies rendering other kinds of passenger service over the same

portion of the Parkway. Using the nine month period from January 1 to September 30, 1966, as an example, the evidence established that W. V. & M. operates an average of 52 one-way trips per day between Key Bridge and the C.I.A. This use of the Parkway includes service to outlying suburban Virginia in excess of the authority granted by Park Service permits and Regulations. Using the same period as an example, the evidence shows that Airport Transport, Inc. operates an average of about 98 one-way trips per day between Dulles Airport and a terminal in downtown Washington. These airport buses use the Parkway between Key Bridge and its intersection with Route 123 near the C.I.A. Occasionally, Airport Transport also carries passengers between Dulles and National Airports, in which event the Parkway is also used between Key Bridge and National Airport. On such occasions a limousine, rather than a bus, is generally used. The government-owned shuttle service between the C.I.A. and Key Bridge on the Parkway also involves about 99 one-way trips per day, about 52 of which are by bus and the rest by limousine.

The most glaring example, however, of the discriminatory effect of the regulations can be illustrated by comparing the use of the Parkway above Key Bridge by W. V. & M. with the use of the Parkway below Arlington Memorial Bridge by A. B. & W. (Alexandria, Barcroft & Washington Transit Company), also a suburban commuter bus company. A. B. & W. is permitted to operate about 820 one-way trips per day on the Parkway below Arlington Memorial Bridge. It should be noted that not all of these trips cover the entire stretch between the Memorial Bridge and Mount Vernon. Many, if not most, of these trips enter or leave the Parkway between these two points; however, the fact remains that about 820 suburban commuter buses per day are permitted to travel at least some distance on the Parkway below the Memorial Bridge while carrying passengers to and from outlying suburban areas off the Parkway.

For a complete comparison between Parkway use by suburban commuter buses above Key Bridge with all other

use of the Parkway by all other buses, something should be said about sightseeing buses. Between January 1 and October 31, 1966, the National Park Service issued 1224 one day permits (an average of about 4 per day) to the Gray Line in connection with its sightseeing tours A and D conducted over the Memorial Bridge–Mt. Vernon portion of the Parkway. In almost the same period (January 1st to October 19th) A. B. & W. was issued 610 sightseeing permits (an average of about 2 per day) for operations over the same portion of the Parkway. The White House Sightseeing Corportation also operates one or two daily sightseeing trips, and perhaps as many as 5 per day during the peak tourist periods, most of which are conducted over this southern portion. Finally, out-of-state carriers operating over the southern portion of the Parkway are granted an indeterminate number of sightseeing permits at Mt. Vernon by the National Park Service for operations over the southern portions of the Parkway. The evidence adduced at trial indicates that very few, if any, sightseeing buses travel on the Parkway above Key Bridge.

Because an issue has been brought into this case of whether certain legislation enacted in 1960 may have modified or diminished the power of the Secretary of the Interior to regulate suburban commuter bus traffic on the Parkway, some facts as to this legislation should be stated. On September 15, 1960, the Congress of the United States gave its consent and approval (74 Stat. 1031) to a proposed interstate agreement ("Compact") between Virginia, Maryland and the District of Columbia. This Compact, finally ratified by the three signatories on December 22, 1960, established a commission, the WMATC, for the regulation of carriers of passengers between points in the metropolitan area of the District of Columbia. Under Article I of the Compact, the District of Columbia and suburban counties in Virginia and Maryland were included in a "Washington Metropolitan Area Transit District" over which the WMATC would have regulatory authority. In Virginia this District includes the City of Alexandria, the Counties of Arlington

and Fairfax and that portion of Loudoun County occupied by Dulles Airport. In Maryland this District includes Montgomery and Prince Georges Counties. The District therefore includes all parts of the Parkway involved in this litigation.

The purpose of the enabling Act and Compact was the unification in one agency of all authority over commuter transit within this District which was previously vested in the several signatories and the Interstate Commerce Commission. The newly created Commission, the WMATC, was granted the power to issue certificates of public convenience and necessity, prescribe routes, set fares, and otherwise to govern commuter bus traffic in the metropolitan area.

Another important factor is that W. V. & M. and D. C. Transit have been granted certificates by the WMATC to travel on the contested portions of the Parkway to serve suburban commuters. These certificates, however, contain a proviso that the bus companies must meet any criteria set by the Park Service. In other words, the WMATC, in prescribing a route over the Parkway, does not assume to have the power to overrule Park Service Regulations to the contrary; instead, the WMATC specifically states that it is for the bus company involved to comply with Park Service Regulations with respect to Parkway use.

This practice of the WMATC in adding a proviso to its certificates requiring the carrier to satisfy Park Service Regulations is no doubt based upon the specific language of Section 3 of the Act of Congress which authorized the Compact and the creation of the WMATC. Section 3 contains the following proviso:

> * * * *Provided further*, That nothing in this Act or in the compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities.

With respect to the fee requirement of one cent per vehicle mile for use of the Parkway by suburban commuter buses, I find that such fees are well within the limits set by other governmental authorities as to fees ("road taxes") required for use of city and state roads by commuter buses. Arlington County and the District of Columbia require fees of one cent per vehicle mile. These so-called "franchise fees" are also exacted on a mileage basis by the City of Fairfax, the City of Falls Church, and the City of Vienna, Virginia.

Returning now to the discrimination issue, certain facts should be stated about the government's position. The government argues that the presence of suburban commuter buses on the Parkway above Key Bridge is aesthetically objectionable, *per se*, and therefore the regulations designed to limit access to the Parkway by such buses have a rational basis and are valid.

The government also points to an alternative route, via Route 123 and Chain Bridge, which W. V. & M. buses employed before the northern leg of the Parkway was completed and which is still available, although it is slower and a more circuitous route to and from downtown Washington. With respect to D.C. Transit's desire to use the two-mile shortcut to the C.I.A. at the northwest end of the Parkway, the government also points to the availability of the alternate route via the Beltway and Route 193 which D.C. Transit is presently using.

Finally, the government contends that a rational basis exists for the regulations which differentiate between the old and new sections of the Parkway (below Memorial Bridge and above Key Bridge, respectively). As to this contention the government argues that the old section below Memorial Bridge was originally a "Highway" and that only after it was authorized and construction begun was it designated as part of the George Washington Memorial "Parkway." The government further contends that when this section was constructed it partially took the place of a pre-

existing commuter railway; that it was designed and constructed with bus stops; and that unlike the newer section above Key Bridge, it has many intersecting streets (without clover-leaf features) which are regulated by stop lights. In effect, the government is saying that although this old "highway" is now under the authority of the Park Service and is designated as part of a Federal Parkway, it is historically and realistically proper for the Secretary and the Park Service to consider it and govern it as a separate entity apart from the new section of the Parkway above Key Bridge.

Apart from the availability of alternate routes, the government has not established this theory from the evidence adduced at trial. First, from the evidence I cannot find that there is anything aesthetically objectionable, *per se*, about having commuter buses on the Parkway above Key Bridge. The government has offered no valid reason which even attempts to justify a *per se* approach to this problem. In my view, a *per se* approach to solving a problem is only used when prior experiences with similar or identical problems is so convincing that evidence need not be introduced in a given instance to prove what has been proven many times in previous cases. The Court has found no such prior cases involving parkways and commuter buses and the parties have cited none.

Second, and without taking a *per se* approach, I find that the government has not proved that suburban commuter buses have any adverse effect upon scenic aspects of the Parkway at the time of day when such buses would be using it.

In this case the government's only evidence that suburban commuter buses are spoilers of parkway scenic values is a self-serving letter to that effect from the Director of the National Park Service to the WMATC dated November 2, 1962 (Government Exhibit No. 23). The statements made in that letter are opinions rather than facts; there was no opportunity afforded counsel to cross-examine the Di-

rector of the Park Service on the contents of the letter or the assumptions upon which it was based; and there was no independent evidence introduced along the same lines such as expert opinions or testimony of lay persons who were familiar with the scenic values of the Parkway.

Early in this litigation, on January 10, 1964, affidavits by Stewart L. Udall, the Secretary of the Interior, and other officials of the Department of the Interior were filed in support of the government's motion for summary judgment. That motion was denied on February 28, 1964. Since the affidavit of the secretary was not introduced into evidence, it cannot be considered by the Court; however, even if it were evidence in this case, it would give little support to the government's position. The pertinent parts of the affidavit are as follows:

* * *

> In my judgment, it would be contrary to the public interest to allow permanent commuter bus service upon the George Washington Memorial Parkway for the purpose of transporting passengers bebetween the Virginia suburbs and the District of Columbia. The use of this Parkway by ever-increasing numbers of commuter buses with their great bulk, trucklike characteristics, and odors, as is contemplated by the Washington, Virginia & Maryland Coach Company, would, in my opinion, physically damage the scenic value of the Parkway. Further, other routes are available for transportation of passengers between the District of Columbia and the suburbs of Northern Virginia.
>
> In my judgment, allowing permanent commuter bus service of the nature described above, would not be in the public interest, and would be inconsistent with the intendment of Congress.

* * *

In addition to the fact that this opinion was not offered into evidence, nowhere does the Secretary attempt to justify the application of these alleged public interest fac-

tors to only *part* of the Parkway. Since the affidavit shows no recognition of the fact that on a daily basis more than 800 suburban commuter buses are operated by A. B. & W. on the Parkway below the Arlington Memorial Bridge, it loses any relevance to the issues as they are now before the Court. The basic problem in this case is no longer whether the preservation of scenic values, alone, would justify exclusion of commuter buses from the Parkway. The Court agrees that, as an abstract principle, the Secretary does have the authority to deny access by any class of commercial vehicle to all sections of the Parkway. Such a policy has been adopted by the Secretary with respect to trucks. They are not allowed on any section of the Parkway except in special cases. However, the regulations which govern suburban commuter buses employ a double standard—depending upon which part of the Parkway is involved.

I find that regardless of the historical background of the various sections of the Parkway, it is now one Parkway—not two—and that the original congressional authorization for its construction and maintenance had the effect of combining and unifying all preexisting parts of it, together with such extensions of it as may be added thereafter, into one continuous National Parkway.

To summarize the factual situation just presented, the evidence convinces me that the Park Service Regulations here in issue, except those as to fees and those designed to protect a short stretch of the Parkway which has weak construction and cannot withstand heavy bus traffic, discriminate against suburban commuter bus companies desiring to use the Parkway above Key Bridge. The regulations discriminate between Parkway use above Key Bridge when contrasted with Parkway use below Memorial Bridge; and with respect only to the Parkway above Key Bridge there is also a double standard—one for commuter buses and the other with respect to other buses rendering similar but not identical services such as airport buses.

DISCUSSION

The issues of discrimination and unreasonableness must be analyzed within a legal framework which is fairly clear and about which all the parties seem to agree. The bus companies, citing *Eastern Central Motor Carriers Ass'n v. United States,* 239 F.Supp. 591, 594 (D.C.D.C. 1965) maintain that the allegedly discriminatory regulations must be found invalid if they are without a rational, substantial or sound basis. Other cases are cited to the same effect.[1] Reliance is also placed on Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, which contains a general prohibition against administrative regulations or orders which are either "*** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law***."

The WMATC and the Virginia State Commission urge a similar standard. Citing *Sproles v. Binford,* 283 U.S. 374, 396 (1932), and *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911), the commissions contend in their brief that the regulations must be declared invalid if they "lack a rational basis."

This is precisely the same test which the government seeks to have applied in this case. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Miss. Valley Barge Co. v. United States,* 292 U.S. 282, 286-287 (1934) (cited in the government's post-trial brief).

What the issue comes down to is this: In view of the broad discretion vested in the Secretary and the Park Service, and in view of the limited role of the reviewing Court, does the evidence show a rational basis for the regulations

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[1] *Jenkins v. Macy,* 237 F. Supp. 60, 62 (E.D.Mo. 1964), affirmed 357 F.2d 62; *Irvin v. Hobby,* 131 F. Supp. 851, 865 (N.D. Iowa 1955); *NLRB v. Minnesota Min. & Mfg.,* 179 F.2d 323, 326 (8th Cir. 1950); and *Willapoint Oysters v. Ewing,* 174 F.2d 676, 695 (9th Cir. 1949) *cert. denied* 338 U.S. 860, *rehearing denied,* 339 U.S. 945.

here in issue? I conclude that the evidence does not show a rational basis for the regulations as they now exist.

The first step in applying the "rational basis" test which the parties seem to agree upon, is a proper understanding of the facts; however, while searching the facts and circumstances of this case to find a rational basis for the regulations, just the contrary has become clear to the Court. First, the Court cannot understand how 52 daily suburban commuter buses operated by W. V. & M. could be aesthetically objectionable when approximately 200 airport and C.I.A. commuter buses of the same style and size, operating over the same route, are not aesthetically objectionable. Second, the Court cannot understand how the government can, in good faith, request injunctive relief against these 52 daily bus trips when the Park Service allows more than 800 daily trips below Memorial Bridge by buses with identical physical characteristics and performing an identical service. Even without more, these facts establish the allegations that the regulations lack a rational basis and that they are discriminatory, unreasonable and therefore invalid.

The government, perhaps anticipating the Court's rejection of its contention that "preservation of scenic values" is, *per se*, a rational basis for the regulations, sought to establish that the Parkway is a scenic Parkway only above Key Bridge, with an older, multiple access "Highway" tacked onto its southern extremity. In addition to my finding that this is factually not true, the evidence establishes the contrary. In direct conflict with this contention is the fact that literally thousands of sightseeing bus trips are made every year on the Parkway south of the Memorial Bridge but that very rarely do any of them travel on any portion of the Parkway above Memorial Bridge. The activity of these sightseeing buses is strong evidence, contrary to the government's contention, that the Parkway below Memorial Bridge is a scenic attraction which equals and perhaps surpasses the newer section above Key Bridge.

In my opinion, the Secretary and the Park Service are "clearly wrong" and the weakness of the "scenic values"

argument is "so manifest that the Court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the Act of Congress."[2]

In addition to the foregoing, something should be said about certain aspects of this case which may not be clearly presented on the record. The Court received the impression that there is more to this controversy than meets the eye. Because of the peculiar or unusual nature of certain cases it is often difficult to understand the "theory" upon which the respective parties are proceeding; however, in this case there were too many inferences to be drawn from the evidence—all pointing to the same problem—for the Court not to comment. My comments are also intended as an assurance to the parties that certain elements of the case did not go unnoticed by the Court.

The "buried problem" involves the whole question of adequate highways and mass transit facilities to handle the large and growing volume of commuter traffic in the District of Columbia metropolitan area. The problem is most acute in the Virginia suburbs because traffic to and from the District of Columbia must squeeze onto a few bridges across the Potomac River. This case presents a unique as-

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[2]Quoting from *Boski v. Comingore*, 177 U.S. 459, 470 (1900) (cited in the government's post-trial brief). The Act of Congress which is relevant here is the Act of August 25, 1916 (39 Stat. 535 as amended, 16 U.S.C., §§ 1, 3) which directs the Secretary of the Interior and the National Park Service to

> "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (16 U.S.C. § 1).

This Act also authorized the Secretary of the Interior to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." (16 U.S.C. § 3).

pect of this problem because the Parkway provides direct access to Key Bridge, Theodore Roosevelt Memorial Bridge, Arlington Memorial Bridge and the "14th Street" Bridge, all of which provide Virginia commuters with direct access to the downtown area of the District of Columbia. The motion pictures which are in evidence amply support a finding of which the Court could take judicial notice anyway; that however one might view it, the Parkway is an extremely heavily travelled commuter highway. To the thousands of commuters who use it and to the officials who use it and to the officials who must regulate it, it is not a scenic parkway during weekday rush hours and no amount of wishful thinking can make it so without a drastic highway building program in suburban Virginia to ease the load on the Parkway.

The significance of this state of affairs is that the Secretary may have reasons quite apart from what he calls "scenic values" for the strange and discriminatory set of regulations which now prohibit suburban commuter buses from the northern portion of the Parkway. I seem to detect an implied warning, directed across the Potomac toward Virginia, and also toward the WMATC, that the Parkway cannot be relied upon, as it has been in the past, as a route to be used for easing the mounting pressure of commuter traffic, including mass transit, in lieu of new highways being opened.

I mention this latent element in this case because there undoubtedly must be more to the government's position than the "scenic values" and "old highway-new parkway" arguments which have been relied upon. These two theories do not have substantial evidence in the record to support them and they do not provide a rational basis for the unfair and discriminatory double standard regulations which presently apply to the suburban buses using the Parkway. These, nevertheless, are the contentions advanced by the government and I have no alternative but to invalidate this regulatory pattern in the absence of a rational basis in the evidence of record.

The government, on the other hand, has demonstrated a rational basis for the fee requirement which applies to buses using the Parkway and to the prohibition against buses traveling on the structurally weak section of the Parkway between Key and Memorial Bridges. The cost of maintenance is a substantial and rational basis for these two aspects of the Parkway regulatory pattern.

As to the counterclaim by W. V. & M. in Civil Action No. 1172-63 (the first of these two actions, wherein the United States is plaintiff) requesting a return of $2,284.16 representing fees paid by W. V. & M. up to the time of trial, the Court concludes, as an alternative reason for denying this particular request, that it is without jurisdiction. This counterclaim is a demand against the United States and even though it is under $10,000.00 it does not state a claim under the Tucker Act, 28 U.S.C. § 1345(a) (2), because it is not based on either an express contract or a contract implied in fact. It is therefore a claim for damages against the government without the government having given its consent to be sued. See *Cobb v. Shore*, 87 U.S. App. D.C. 162, 183, F.2d 980 (1950); *Alabama v. United States*, 282 U.S. 502, 506 (1931); *United States v. Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926).

The Court concludes therefore that the Regulations of the Park Service are valid and have a rational basis except for those which deny W. V. & M. and D.C. Transit unlimited commuter bus use of the Parkway below Arlington Memorial Bridge, permits for such traffic above the Key Bridge must also be granted.

The regulations may exclude *all* commuter buses from the Parkway, but access or exclusion must not be discriminatory. Such regulations could permit such traffic only during certain hours of the day or during all hours of the day, but whenever granted the present distinctions between buses using the northern and southern portions of the Parkway cannot be part of the regulatory pattern.

This opinion, together with the detailed Findings of Fact and Conclusions of Law annexed hereto as Appendix B shall constitute all of the findings of fact and conclusions of law in this case.

Counsel will submit an appropriate order.

John J. Sirica
United States District Judge

April 13, 1967

[A map attached to the above Opinion as an appendix, is reproduced as a foldout page herein at the end of this volume]

APPENDIX B

FINDINGS OF FACT

(1) Title to the George Washington Memorial Parkway is vested in the United States. Administration of the Parkway is a responsibility of the National Capital Region of the National Park Service under the jurisdiction of the Secretary of the Interior. The Act of August 25, 1916 (39 Stat. 535, as amended, 16 U.S.C. § 3), authorized the Secretary of the Interior to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service."

(2) Pursuant to Section 1 of the Act of August 25, 1916 (39 Stat. 535, 16 U.S.C. § 1), the National Park Service is directed to "promote and regulate the use of the Federal areas known as national parks *** by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpared for the enjoyment of future generations."

(3) Following the opening of the George Washington Memorial Parkway from Spout Run to the C.I.A. Building on November 3, 1959, the Department of the Interior, on December 30, 1959 (24 Fed. Reg. 11019), adopted the following regulation [36 C.F.R. (1960 Rev.) 3.36(b) (2)], with particular reference to the operation of commuter buses on the Parkway:

> Passenger carrying buses for hire or compensation shall be permitted on the George Washington Memorial Parkway upon application for, and the granting of a permit by the Superintendent, National Capital Parks, issued on an annual basis, effective from April 1 until the following March 31, at the rate of $3 for each passenger-carrying seat in every vehicle so op-

> erated. Such permits may be issued (i) to provide passenger service on any portion between Mount Vernon and the Arlington Memorial Bridge, (ii) to provide limited direct non-stop passenger service between Key Bridge and the Central Intelligence Agency at Langley, Virginia, and (iii) to provide limited direct non-stop passenger service between the interchange at Route 123 and the Central Intelligence Agency Building at Langley, Virginia.

Subsequent to the publication of these regulations, the W. V. & M. Coach Company, on February 15, 1960, petitioned the Secretary for a modification thereof and a hearing on the petition. Such hearing was held on February 29, 1960; however, no report containing findings of fact, conclusions of law, or orders was ever served on W. V. & M.

(4) On April 18, 1960, the Interstate Commerce Commission[1] issued a certificate of public convenience and necessity to W. V. & M. to provide commuter bus service to the C.I.A. Building. This permit authorized W. V. & M. to travel over the Parkway between Arlington Memorial Bridge (Route 50) and the C.I.A. Building and it authorized bus travel over the Spout Run Parkway. A restriction in the permit stated that:

> The authority granted herein is subject to compliance by said carrier with any rules, regulations, or requirements which may be by law maintained or adopted by the Secretary of the Interior in connection with his administrative jurisdiction over matters relating to national parks.

(5) With the opening of the C.I.A. Building in the fall of 1961, W. V. & M. applied for a permit to "initiate express bus service over the George Washington Memorial Parkway to the C.I.A. Building at Langley, Va." Pursuant to the foregoing regulation, a Park Service permit was issued

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[1] The WMATC had not yet been created, thus, the I.C.C. still had jurisdiction over the commuter service rendered by W. V. & M. between Virginia and the District of Columbia.

authorizing use of the Parkway, as requested, to furnish service to and from the C.I.A. Building only. The pertinent provisions of this permit were as follows:

> Permission is granted to operate buses on the following portions of the George Washington Memorial Parkway in accordance with existing regulations:
>
> 1. To provide limited direct non-stop passenger service between Key Bridge and the Central Intelligence Building at Langley, Virginia.
> 2. To provide limited direct non-stop passenger service between the Interchange at Route 123 and the Central Intelligence Building at Langley, Virginia.

(6) For a short period of time in late 1961, W. V. & M. operated a bus service, as authorized by the Park Service permit and regulations, from downtown Washington to the C.I.A. Building and return. At this time, W. V. & M. provided suburban commuter bus service from the northern Virginia area to Washington by a scheduled route that proceeded down Highway 123, over the Parkway at a cloverleaf intersection, across Chain Bridge into the District of Columbia, and thence to downtown Washington.

(7) In the summer of 1962, it was ascertained that W. V. & M. had ceased to use the Parkway solely for commuter service to the C.I.A. Building. Instead, suburban commuters were picked up in Washington whose destination was beyond the C.I.A. Building, and these buses, after stopping at the C.I.A. Building, would proceed beyond that point into suburban Virginia to discharge passengers. On return runs, suburban commuters would be picked up by a bus that would stop at the C.I.A. and then proceed down the George Washington Memorial Parkway into Washington. Although the scheduled route via Route 123 and Chain Bridge was still used by W. V. & M., the unauthorized increase in Parkway use lessened the use of Route 123 and Chain Bridge.

(8) On November 16, 1962 (27 Fed. Reg. 11346), the applicable regulation [36 C.F.R. (1966 Supp.) 3.36(b) (3) (i)] was amended. The provision relating to commuter buses was altered slightly to make clear that the service to the C.I.A. was to a "terminus" at the C.I.A. Building, with "direct return." In other words, this amendment was designed to make sure that W. V. & M. knew it was not authorized to use the Parkway for carrying passengers picked up or to be discharged beyond the C.I.A. Building.

(9) On November 16, 1962, a revised Park Service permit was issued to W. V. & M. to be effective until June 30, 1963. This permit merely modified the language of the previous permit to reflect the changes in the applicable regulation, that is, to plainly state that the Parkway use was limited to a "terminus" at the C.I.A. Building and "direct return" to Key Bridge.

(10) On December 14, 1962, W. V. & M. petitioned the Secretary for a modification of these regulations and for a hearing. This petition was denied on March 14, 1963, without explanation or further elucidation of the reasons for restricting commuter buses on the Parkway above Key Bridge. Meanwhile, W. V. & M. did not accept the revised permit and has since, despite objections made by representatives of the Department of the Interior, continuously exceeded the terms of the permit and the regulations by operating buses on the George Washington Memorial Parkway which carry suburban commuters and not limited to providing service only to the C.I.A. Building and direct return. For example, W. V. & M.'s Route 5-C picks up passengers as far away as Seven Corners, Virginia. This route, instead of proceeding east to the District of Columbia down U.S. Highways 29 and 211 through the center of Arlington and across Key Bridge, goes the opposite direction of those highways and eventually proceeds down Route 123, and the Parkway, to Key Bridge.

(11) On October 27, 1964, the WMATC issued a certificate of public convenience and necessity to W. V. & M.,

covering the Route 5-C, which prescribed use of the Parkway for transporting commuters to and from a large area of Northern Virginia. This certificate contained the following statement: "It is for the carrier to meet any requirements adopted by the Signatories and the Park Service pursuant to their 'normal and ordinary' police powers." Without meeting such requirements, W. V. & M. is, nevertheless, operating its Route 5-C as authorized only by the WMATC while contending that its failure to comply with Park Service Regulations is due to the invalidity of the regulations.

(12) For its part, D.C. Transit has authority from the WMATC to operate over the portion of the Parkway between the C.I.A. site and the Beltway (Interstate 495); however, the Park Service has refused to permit such operations. D.C. Transit, while objecting to this refusal by the Park Service, has refrained from using the Parkway.

(13) The regulations of the National Capital Region of the National Park Service (36 C.F.R. 3.36) authorize the issuance of general unlimited permits for commuter bus service on that portion of the Parkway between Mount Vernon and the Arlington Memorial Bridge. This unlimited use is in contrast to the limited use permitted north and west of the Key Bridge. The regulations also permit concession-authorized nonscheduled bus service to Dulles and National Airports for the accommodation of air travelers. Airport Transport, Inc., by a concession agreement with the Federal Aviation Authority, provides nonscheduled, direct, nonstop service between Dulles and downtown Washington, and between Dulles and National Airports for the accommodation of air travelers in the Washington area. Portions of the Parkway are used to provide this service to air travelers and Airport Transport holds a permit in connection with this use of the Parkway. The regulations also allow sightseeing buses to use any portion of the Parkway at any time upon obtaining a permit and payment of fees. The airport and sightseeing buses are not limited in their use of the

Parkway to certain portions thereof; however, as a practical matter, almost all sightseeing bus traffic is south and east of the Arlington Memorial Bridge.

(14) The regulations of the Secretary of the Interior, since their amendment on December 30, 1959 [24 Fed. Reg. 11019, 36 C.F.R. (1960 Rev.) 3.36(b) (2)], have not authorized the issuance of a permit to W. V. & M. to use the Parkway between Key Bridge and Arlington Memorial Bridge (Route 50). In practical effect, this means that buses providing direct service to and from the C.I.A. Building or suburban commuter service to outlying areas must enter and leave the District of Columbia via Key Bridge rather than via the Roosevelt Bridge or the Arlington Memorial Bridge. These latter two bridges provide a quicker and more direct route between certain parts of suburban Virginia and much of the downtown area of Washington than does the Key Bridge. In addition, the regulations do not permit the operation of commuter buses down the Spout Run part of the Parkway which has the practical effect of requiring the buses which would otherwise use this section of the Parkway to use slower routes to reach either Key Bridge, Roosevelt Bridge or the Arlington Memorial Bridge.

(15) The section of the Parkway between the Key Bridge and the Arlington Memorial Bridge was constructed in 1937 and it does not have the same subsurface strength that underlies other portions of the Parkway. It is subject to seepage from the adjacent hillsides and breaks easier under the stresses of heavy traffic. It has been a maintenance problem and today shows evident signs of constant cracking and patching. It is considered by the Interior Department and the Park Service as not being capable of withstanding heavy bus traffic. At present no commuter buses are allowed on this portion of the Parkway. The limited amount of travel by Airport Transport, Inc. on this section is almost exclusively by limousine rather than by heavy buses. Sightseeing buses rarely use this or any other part of the Parkway above the Arlington Memorial Bridge.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction over all claims and counterclaims except for the counterclaim of W. V. & M. in Civil Action No. 1172-63 for the return of fees in the amount of $2,284.16 which have already been paid for the use of the Parkway.

(2) Park Service Regulations requiring the present and future payment of fees of one cent per vehicle mile for use of the Parkway by suburban commuter buses are reasonable, within the authority of the Secretary of the Interior to promulgate, have been adopted pursuant to the inherent police powers of the Secretary to regulate and maintain a government-owned national park, and they apply equally to all buses of the same class and therefore are not discriminatory. Thus, the claims seeking injunctive relief or declaratory injunctive relief against the Secretary of the Interior and the Regional Director of the National Park Service restraining them from present and future collection of fees are without merit and the Secretary of the Interior and the Regional Director of the National Park Service will not be enjoined from collecting such fees for such present and future use of the Parkway by suburban commuter buses as may be permitted.

(3) With respect to the counterclaim of W. V. & M. in the first action (Civil Action No. 1172-63) for the return of fees already paid, although the Court concludes that it has no jurisdiction over this counterclaim because it is a non-contractual money claim against the government without the government's consent to be sued, the Court also concludes, *assuming* it has jurisdiction, that the regulations pursuant to which these fees were paid were within the authority of the Secretary of the Interior to promulgate, they were adopted pursuant to the inherent police powers of the Secretary to regulate and maintain a government-owned national park, and they were applied equally to all buses of the same class and therefore they were not discriminatory. Thus, this counterclaim is without merit.

(4) The Act of September 15, 1960 (74 Stat. 1031, 1037), creating the Washington Metropolitan Area Transit Commission (the WMATC) with authority to issue certificates of public convenience and necessity and to prescribe routes with respect to transportation for hire by motor vehicles in the Washington Metropolitan District, did not revoke by implication or supersede the authority of the Secretary of the Interior to promulgate reasonable regulations with respect to administration and use of the George Washington Memorial Parkway.

(5) The issuance of a certificate of public convenience and necessity by the WMATC authorizing a route over the George Washington Memorial Parkway is not in itself sufficient to permit operations on the Parkway. Use of the Parkway pursuant to such certificate is conditioned upon compliance with reasonable regulations promulgated by the Secretary of the Interior regarding such use and it is also conditioned upon the reasonable exercise of discretion by the Secretary of the Interior through the National Park Service in issuing permits for such use according to such reasonable regulations.

(6) The National Park Service Regulations promulgated by the Secretary of the Interior are unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, insofar as they do not permit suburban commuter buses owned by W. V. & M. and D.C. Transit to operate without limitation on the Parkway above the Key Bridge including the Spout Run section pursuant to their certificates from the WMATC. The regulations are unreasonable, arbitrary, capricious, discriminatory and therefore invalid insofar as, and so long as, other regulations do permit suburban commuter buses owned by other bus companies to operate without limitation of the Parkway below the Arlington Memorial Bridge.

(7) To the extent that the Park Service Regulations are unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, by allowing commuter buses to operate on

the southern part of the Parkway but not on the portions above the Key Bridge, so, too, is any refusal of the Secretary of the Interior or any of his delegates, to issue permits to W. V. & M. and D.C. Transit for unlimited access to the Parkway above Key Bridge basing such refusal on such unreasonable, arbitrary, capricious, discriminatory, and invalid regulations.

(8) The claim of the United States in Civil Action No. 1172-63 for injunctive relief against W. V. & M. will be denied, and the claims of W. V. & M. and D.C. Transit seeking a declaration of invalidity as to the regulations which deny their suburban commuter buses unlimited access to the Parkway north of Key Bridge will be granted because such regulations are invalid and will be invalid *so long as* they remain unreasonably discriminatory by allowing commuter buses unlimited access to the Parkway below Arlington Memorial Bridge while denying unlimited commuter bus use of the Parkway above the Key Bridge.

(9) The National Park Service Regulations promulgated by the Secretary of the Interior which do not permit *any* suburban commuter buses to use that section of the Parkway between the Arlington Memorial Bridge and the Key Bridge are reasonable and valid because of structural weakness and maintenance problems, but only *so long as all buses,* including sightseeing buses and airport buses (not including limousines), are similarly denied access. Accordingly, the claims of W. V. & M. seeking a declaration of invalidity as to the regulations which deny its suburban commuter buses any access to this portion of the Parkway will be denied.

(10) All parties shall bear their own costs.

John J. Sirica
United States District Judge

April 13, 1967

ORDER OF JUNE 9, 1967, OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A. Nos. 1172-63 and 2874-63

These consolidated actions came on for trial without a jury, and upon consideration of all the oral testimony, documentary evidence, legal memoranda, the Court's Findings of Fact, Conclusions of law and Opinion filed herein on April 13, 1967, and also in consideration of the arguments of counsel upon proposed orders on May 19, 1967, it is by the Court, this 9th day of June, 1967,

ORDERED, ADJUDGED AND DECREED, in Civil Action No. 1172-63, that the Regulations of the National Capital Region, National Park Service, as amended December 30, 1959, and November 16, 1962, are discriminatory, invalid and inoperative insofar as they do not permit suburban commuter buses owned by the Washington, Virginia and Maryland Coach Company, Inc. and the D. C. Transit System, Inc. to operate without limitation on the George Washington Memorial Parkway in the State of Virginia above Key Bridge pursuant to their certificates from the Washington Metropolitan Area Transit Commission. The regulations are discriminatory, invalid and inoperative insofar as, and so long as, suburban commuter busss owned by other bus companies are allowed to operate without limitation on the Parkway below the Arlington Memorial Bridge, an it is further

ORDERED that the request of the United States for an injunction and declaratory judgment against the Washington, Virginia and Maryland Coach Company, Inc. be, and the same hereby is denied, and it is finally

ORDERED that the request of the Washington, Virginia and Maryland Coach Company, Inc. for a refund of $2,284.16 be, and the same hereby is, denied.

And it is ORDERED, ADJUDGED AND DECREED, in Civil Action No. 2874-63, that the Regulations of the National Capital Region, National Park Service, as amended December 30, 1959, and November 16, 1962, are discriminatory, invalid and inoperative insofar as they do not permit suburban commuter buses owned by the Washington, Virginia and Maryland Coach Company, Inc. and the D. C. Transit System, Inc. to operate without limitation on the George Washington Memorial Parkway in the State of Virginia above Key Bridge pursuant to their certificates from the Washington Metropolitan Area Transit Commission. The regulations are discriminatory, invalid and inoperative insofar as, and so long as, suburban commuter buses owned by other bus companies are allowed to operate without limitation on the Parkway below the Arlington Memorial Bridge, and it is further

ORDERED that all requests for affirmative relief are denied.

/s/ JOHN J. SIRICA
United States District Judge

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,394

STEWART L. UDALL, Secretary of the Interior, *et al.*,
Appellants

v.

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, INC.,
Appellee

D. C. TRANSIT SYSTEM, INC., Intervenor

No. 21,395

UNITED STATES OF AMERICA, Appellant

v.

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, INC.,
Appellee

D. C. TRANSIT SYSTEM, INC., WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, and VIRGINIA STATE CORPORATION COMMISSION, Intervenors

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Appeals from the United States District Court
for the District of Columbia

Decided June 12, 1968

Mr. A. Donald Mileur, Attorney, Department of Justice, with whom *Assistant Attorney General Martz*, *Acting Assistant Attorney General Harrison*, and *Messrs. Roger P. Marquis* and *Thos. L. McKevitt*, Attorneys, Department of Justice, were on the brief, for appellants. *Mr. J. Edward Williams*, Attorney, Department of Justice, also entered an appearance for appellants.

Mr. Manuel J. Davis for appellee and for intervenor D. C. Transit System, Inc.

Mr. Russell W. Cunningham, with whom *Mr. Renn C. Fowler* was on the brief, for intervenors Washington Metropolitan Area Transit Commission and Virginia State Corporation Commission.

Messrs. Wilmer S. Schantz, Jr. and *Samuel M. Langerman* were on the brief for intervenor D. C. Transit System, Inc.

Before PRETTYMAN, *Senior Circuit Judge*, and WRIGHT and TAMM, *Circuit Judges*.

WRIGHT, *Circuit Judge*: The facts of this appeal can be quickly stated. The United States owns and controls a strip of land which runs along the Potomac River on the Virginia side. Located on this strip is a multi-lane highway, known as the George Washington Memorial Parkway, which stretches from Mount Vernon at its southern end through the city of Alexandria, north through Arlington and Fairfax Counties, past Memorial and Key Bridges, to its northern end at the intersection of the Capital Beltway, Route 495. The Parkway is administered by the National Park Service of the Department of the Interior, whose Secretary has been charged by Congress to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments and reservations under the jurisdiction of the National Park Service * * *."[1]

Pursuant to this authority the Secretary has issued a series of regulations relating to the operation of commercial vehicles and common carriers on the George Washington Memorial Parkway. The regulations relevant to this appeal provide that passenger carrying vehicles for hire or compensation, other than licensed taxicabs and airport transport ve-

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[1] Act of August 25, 1916, § 3, 16 U.S.C. § 3 (1964 ed.).

hicles carrying fewer than 14 passengers, are permitted to use the Parkway only with a permit from the Regional Director of the Park Service and only under certain conditions. In essence, permits are granted for unlimited commercial bus service south of Memorial Bridge and, because of the condition of the road surface, no bus service is permitted from Memorial Bridge north to Key Bridge. North of Key Bridge sightseeing buses are allowed pursuant to a permit, as are buses operating nonstop to and from Dulles International and National Airports. But the Secretary's regulations forbid regular commuter bus service over the northern sector of the Parkway except for "direct nonstop passenger service from Key Bridge to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return, and (*c*) to provide limited direct nonstop passenger service from the interchange at Route 123 to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return."[2]

In 1961 Washington, Virginia and Maryland Coach Company, the appellee, obtained a permit from the Park Service to run its buses on the northern sector of the Parkway in a manner consistent with the Secretary's regulations. Then, apparently in 1962, it came to the attention of the Park Service that WV&M was not obeying the regulations in that, after making their runs to the CIA Building, its buses were continuing on into northern Virginia, collecting and discharging passengers, and then returning to the Parkway for the return trip south. This procedure violated its permit, which authorized only nonstop trips to the CIA Building and *direct return.*

After negotiation with WV&M, its permit was reissued with this requirement of direct return made even more explicit. Nevertheless, WV&M has consistently denied the validity of the regulations and has continued to violate their

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[2] 36 C.F.R. § 50.36(b)(3)(i) (Supp. 1968).

terms. Consequently the United States brought suit to restrain WV&M from continuing its unauthorized operation of a suburban commuter bus service on the Parkway between Key Bridge and the CIA Building. D. C. Transit System, Inc., the parent corporation of WV&M, and the Washington Metropolitan Area Transit Commission[3] intervened as defendants. In answer to the suit, WV&M denied the validity of the regulations and counterclaimed for a return of fees paid to the Park Service. In a separate action in which D. C. Transit and WMATC joined as plaintiffs, it sued the Secretary of the Interior to challenge the validity of his regulations.

After the consolidation and trial of these cases the District Court ruled that WV&M was not entitled to refund of the $2,284 in fees which it had paid up to the time of trial to use the Parkway. It also denied the claim of the United States for injunctive and declaratory relief, ruling that the Secretary's regulations were "unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, insofar as they do not permit suburban commuter buses owned by W. V. & M. * * * to operate without limitation on the Parkway

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[3]The WMATC has authorized the WV&M bus service which the Secretary of the Interior has sought to curtail. But WMATC's argument as intervenor is only that the Secretary's regulations are unreasonable. The Commission has not urged that its authority overrides that of the Secretary. The trial court addressed itself to the issue of the relationship between the Commission and the Secretary, holding:

> "The Act of September 15, 1960 (74 Stat. 1031, 1037), creating the Washington Metropolitan Area Transit Commission (the WMATC) with authority to issue certificates of public convenience and necessity * * * in the Washington Metropolitan District, did not revoke by implication or supersede the authority of the Secretary of the Interior to promulgate reasonable regulations with respect to administration and use of the George Washington Memorial Parkway." *United States* v. *Washington, Virginia & Maryland Coach Co.*, D. D.C., 268 F.Supp. 34, 50-51 (1967).

This conclusion of law has not been challenged on appeal and is not now before this court.

above the Key Bridge * * *." 268 F.Supp. at 51. We affirm this decison with respect to the validity of the fees exacted, but reverse the denial of injunctive and declaratory relief.

In essence the trial judge felt that the regulations were discriminatory and invalid for two reasons: first, because they unreasonably allow unlimited bus service south of Memorial Bridge while limiting such service north of the Bridge[4]; and second, because they allow sightseeing, airport and CIA Building buses north of Key Bridge while prohibiting general commuter service on this section of the Parkway.

The Secretary explained his reasons for the regulations in an affidavit in support of the United States' motion for summary judgment. He felt that the use of the Parkway by "ever increasing numbers of commuter busses with their great bulk, trucklike characteristics, and odors, as is contemplated by the Washington, Virginia & Maryland Coach Company, would, in my opinion, physically damage the scenic value of the Parkway."

The trial judge, however, concluded that the Secretary's regulations were not reasonably related to his goal of preserving the scenic value of the Parkway. For he felt that the southern sector of the Parkway was more scenic than the northern sector[5] and consequently to allow unlimited

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[4]Below Memorial Bridge the Alexandria, Barcroft and Washington Transit Company operates about 820 regularly scheduled one-way trips per day. That so much bus service is permitted below Memorial Bridge while comparatively little is permitted above Key Bridge constituted to the trial judge "[t]he most glaring example * * * of the discriminatory effect of the regulations * * *." 268 F.Supp. at 40.

[5]The basis for this conclusion was the fact that, while thousands of sightseeing bus trips are made each year on the southern portion of the Parkway, only a handful venture to the north. But the riders of sightseeing buses may well be more interested in historic sites than in scenic beauty. This could well explain the sightseers' preference for the southern sector of the Parkway.

traffic on the southern sector, while prohibiting it to the north, was unreasonable. He felt also that, because the CIA Building, airport and sightseeing buses were physically identical with the WV&M buses, to bar the latter on the northern sector of the Parkway, while permitting the former, was unreasonably discriminatory. He emphasized that he could not "understand how 52 daily suburban commuter buses operated by W. V. & M. could be aesthetically objectionable when approximately 200 airport and C.I.A. commuter buses * * * are not aesthetically objectionable." 268 F.Supp. at 44.

The Secretary, however, did not find that only WV&M buses were unsightly. In his affidavit he "reluctantly" concluded, "after weighing the interest of the public in retaining the present natural beauty of the Parkway and its environs[6] as against the compelling necessity to provide CIA employees swift and immediate access to their Agency," that direct commercial transportation to the CIA Building should be permitted on the Parkway. Similar considerations prompted his decision with regard to the use of the Parkway for access to Dulles International Airport.

A rationale for the Secretary's distinction between the southern and northern sectors of the Parkway was offered by Robert C. Horne, Associate Regional Director of the Capital Region of the National Park Service. He explained that the portion of the Parkway between Alexandria and Mount Vernon was authorized in 1928 and constructed in 1932. It replaced a previously existing commuter railway, and there have never been any limitations on commuter bus

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[6]The Secretary pointed out in his affidavit that Congress had expressed its concern "that the scenery and natural objects found on the George Washington Memorial Parkway * * * be conserved * * *," citing act of May 29, 1930 (46 Stat. 482), and act of August 25, 1916 (39 Stat. 535), as amended (16 U.S.C. § 1).

service.[7] It provides the two entrances to National Airport and connects with several cross streets and bisects several communities south of Alexandria. By contrast, the Parkway north of Key Bridge is a limited access road with no intersecting cross streets. It is known for its scenic beauty and was constructed in part to accommodate CIA personnel. It replaced no existing commuter highways or railroads, and general commuter bus service has never been allowed on any portion of it.[8]

As the distinguished trial judge recognized, there is a judicial presumption of validity of administrative action, and the burden is on WV&M to overcome that presumption. *Duesing* v. *Udall*, 121 U.S.App.D.C. 370, 374, 350 F.2d 748, 752 (1965), *cert. denied*, 383 U.S. 912 (1966). The court should not seek to make a *de novo* determination, and it need not agree with the Secretary's judgment in order to uphold it. For where there is more than one solution to an administrative problem the court will uphold any one that has a rational basis. *Udall* v. *Tallman*, 380 U.S. 1 (1965). Here the task of weighing the competing uses of federal property has been delegated by Congress to the Secretary of the Interior. The balance which he strikes will not be judicially upset unless it is arbitrary or beyond his authority. *United States* v. *Shimer*, 367 U.S. 374, 381-382 (1961), quoting *Bates & Guild Co.* v. *Payne*, 194 U.S. 106,

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[7]The section of the Parkway from Memorial Bridge south to Alexandria was originally closed to commuter buses, but was opened to such buses in 1942 as a wartime conservation measure to provide service to National Airport, then under construction.

[8]The section from Memorial Bridge north to Key Bridge was opened to traffic in 1937. The section from Key Bridge north to Spout Run was opened in early 1951. It is the section from Spout Run north to the CIA Building that was opened in 1959, in part to provide easy access to CIA personnel. *See* HEARINGS ON THE 1957 SUPPLEMENTAL APPROPRIATION BILL (Act of July 27, 1956, 70 STAT. 678) BEFORE SUBCOMMITTEES OF THE HOUSE COMMITTEE ON APPROPRIATIONS, 84th Cong., 2d Sess., Part 1, pp. 247, 255, 273, 304 (1956).

108-109 (1904). "Error or unwisdom is not equivalent to abuse." *A. T. & T. Co.* v. *United States,* 299 U.S. 232, 236 (1936). Where administrative control has been congressionally authorized, the judicial function is exhausted once there is found some "rational basis" for the action taken. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286-287 (1934). *See also Thor Westcliffe Development, Inc.* v. *Udall,* 114 U.S.App.D.C. 252, 314 F.2d 257, *cert. denied,* 373 U.S. 951 (1963).

Such a basis clearly exists in this case. The Secretary reasonably concluded that, for historical and aesthetic reasons, unlimited commuter bus traffic should be permitted south of Memorial Bridge but not north of it. Similarly he reasonably concluded that, while all buses north of Memorial Bridge did detract from the Parkway's scenic beauty, considerations of public interest compelled the allowance of the limited service the Secretary permits. The fact that WV&M now makes only 52 unauthorized commuter trips per day on the Parkway north of Key Bridge, while the airport, CIA and sightseeing buses make 200, is certainly not decisive. Two hundred and fifty-two buses, authorized or unauthorized, are more unsightly and objectionable than 200. But even more important, the 52 daily trips which WV&M now runs in violation of the law might well become several hundred were its operations sanctioned by the Secretary or, though opposed by the Secretary, "authorized" by the courts.

Since the Secretary's discrimination in the use of the Parkway has a reasonable basis in the record, WV&M must seek a political, rather than a judicial, solution to its problem.

Reversed.

TAMM, *Circuit Judge, dissenting:* I would affirm the action of the District Court. I agree with the knowledgeable trial judge that the Secretary's regulations are "unreasonable, arbitrary, capricious, discriminatory, and therefore invalid, insofar as they do not permit suburban commuter buses owned by W.V.&M. . . . to operate without limitation on the Parkway above the Key Bridge . . . ." It is inconceivable to me that the Secretary is able to justify as reasonable and authorized in law, his action in permitting two other bus operators to route identically constructed buses over the Parkway while refusing to permit a third operator, *id est*, Washington, Virginia, and Maryland Coach Company also to operate thereupon. To me the Secretary's justification constitutes an army of words escorting a modicum of reason. His action is nothing more than arbitrary bureaucracy masquerading as reasoned judgment. I do not believe that case law permits an administrative officer, even of cabinet rank, to bestow or withhold valuable franchises with the arrogance of an emperor distributing fiefdoms.

APPENDIX C

Affidavit of The Secretary of The Interior in Support of Government's Motion for Summary Judgment, Filed January 10, 1964

City of Washington
District of Columbia } ss

Stewart L. Udall, being duly sworn, says that:

1. I am Stewart L. Udall, Secretary of the United States Department of the Interior, having been duly appointed by The President of the United States, on January 21, 1961.

2. By Statute, 16 U.S.C. § 3, I am charged with the responsibility of promulgating such rules and regulations as I may deem necessary or proper for the use and management of parks of the national capital region. The George Washington Memorial Parkway is a part of the park system of the national capital region. This Parkway, which is located along the Potomac River in Virginia and Maryland, abounds in natural beauty and affords the people of the Washington Metropolitan area a panorama of unsurpassed scenic splendor. Observation stations have been established along the Parkway where motorists may stop in the course of their travels, and derive some benefit from the natural beauties which surround our Nation's Capital. Congress by virtue of the provisions of the act of May 29, 1930 (46 Stat. 482) and the act of August 25, 1916 (39 Stat. 535), as amended (16 U.S.C. § 1), has expressed its concern that the scenery and natural objects found on the George Washington Memorial Parkway (as well as on other Federal lands within the National Park System) be conserved in such a manner as will leave these natural landmarks of our Nation's Capital unimpaired for the enjoyment of future generations.

3. In my judgment, it would be contrary to the public interest to allow permanent commuter bus service upon the George Washington Memorial Parkway for the purpose of transporting passengers between the Virginia suburbs and the District of Columbia. The use of this Parkway by ever-increasing numbers of commuter busses with their great bulk, trucklike characteristics, and odors, as is contemplated by the Washington, Virginia & Maryland Coach Company, would, in my opinion, physically damage the scenic value of the Parkway. Further, other routes are available for transportation of passengers between the District of Columbia and the suburbs of Northern Virginia.

4. In my judgment, allowing permanent commuter bus service of the nature described above, would not be in the public interest, and would be inconsistent with the intendment of Congress.

5. I have therefore promulgated regulations which strictly limit the use of the George Washington Memorial Parkway between Washington, D. C., and McLean, Virginia, by commuter bus service to direct nonstop service to the Central Intelligence Agency building in Virginia, and to nonscheduled direct, nonstop service for Dulles International Airport, both of which are Federal facilities. In my judgment, and after weighing the interest of the public in retaining the present natural beauty of the Parkway and its environs as against the compelling necessity to provide CIA employees swift and immediate access to their Agency, the latter consideration required that I, however, reluctantly, make the Parkway available for service to the Central Intelligence Agency. Similar considerations prompted my decision with regard to the use of the Parkway for access to Dulles International Airport. No such countervailing considerations are present in the case of permitting use to be made of the Parkway by the Washington, Virginia & Maryland Coach Company, for com-

muter service between the Northern Virginia suburbs and Washington, D. C.

/s/ STEWART L. UDALL
Stewart L. Udall,
Secretary of the Interior

District of Columbia:

I, Harold L. Carlson, a notary public in and for the District of Columbia, do hereby certify that Stewart L. Udall, Secretary of the Interior, personally appeared before me in said District, the said Stewart L. Udall being personally well known to me as the person who executed the affidavit hereto annexed, and acknowledged the same to be his act and deed, as said Secretary of the Interior.

Given under my hand and seal this 2nd day of January, 1964.

/s/ HAROLD L. CARLSON
Notary Public

My Commission expires November 14, 1968

APPENDIX D
Statutes Involved

I

Pertinent parts of the Washington Metropolitan Area Transit Regulation Compact, as approved by Act of September 15, 1960, 74 Stat. 1031, D. C. Code, § 1-1410 to 1-1416 (1967 ed.):

* * *

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That the consent and approval of Congress is hereby given to the State of Virginia and Maryland and to the District of Columbia to enter into a compact, substantially as follows, for the regulation and improvement of mass transit in the Washington metropolitan area, which compact, known as the Washington Metropolitan Area Transit Regulation Compact, has been negotiated by representatives of the States and the District of Columbia and has been adopted by the State of Virginia (ch. 627, 1958 Acts of General Assembly), and in substance by the State of Maryland:

Compact, Article I

ARTICLE I

There is hereby created the Washington Metropolitan Area Transit District, hereinafter referred to as Metropolitan District, which shall embrace the District of Columbia, the cities of Alexandria and Falls Church, the counties of Arlington and Fairfax, and political subdivisions of the State of Virginia located within those counties and that portion of Loudoun County, Virginia, occupied by the Dulles International Airport and the counties

of Montgomery and Prince Georges, in the State of Maryland and political subdivisions of the Stzte of Maryland located within said counties, and all other cities now or hereafter existing in Maryland or Virginia within the geographic area bounded by the outer boundaries of the combined area of said counties, cities and airport.

Compact, Article II

ARTICLE II

The signatories hereby create the "Washington Metropolitan Area Transit Commission," hereinafter called the Commission, which shall be an instrumentality of the District of Columbia, the Commonwealth of Virginia and the State of Maryland, and shall have the powers and duties set forth in this compact and such additional powers and duties as may be conferred upon it by subsequent action of the signatories. The Commission shall have jurisdiction coextensive with the Metropolitan District for the regulation and improvement of transit and the alleviation of traffic congestion within the Metropolitan District on a coordinated basis, without regard to political boundaries within the Metropolitan District, as set forth herein.

Compact, Article XII, §§ 1(a) and 4(a)

ARTICLE XII

Transportation Covered

1. (a) This Act shall apply to the transportation for hire by any carrier of persons between any points in the Metropolitan District and to the per-

sons engaged in rendering or performing such transportation service, except—

(1) transportation by water;

(2) transportation by the Federal Government, the signatories hereto, or any political subdivision thereof;

(3) transportation by motor vehicles employed solely in transporting school children and teachers to or from public or private schools;

(4) transportation performed in the course of an operation over a regular route, between a point in the Metropolitan District and a point outside the Metropolitan District, including transportation between points on such regular route within the Metropolitan District as to interstate and foreign commerce, if authorized by certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, and any carrier whose only transportation within the Metropolitan District is within this exemption shall not be deemed to be a carrier subject to the Compact; provided, however, if the primary function of a carrier's entire operations is the furnishing of mass transportation service within the Washington Metropolitan Area Transit District, then such operations in the Metropolitan District shall be subject to the jurisdiction of the Commission;

(5) transportation performed by a common carrier railroad subject to Part I of the Interstate Commerce Act, as amended.

Certificates of Public Convenience and Necessity; Routes and Services.

4. (a) No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation . . . .

Consent Legislation, §3.

That, upon the effective date of the compact and so long thereafter as the compact remains effective, the applicability of the laws of the United States, and the rules, regulations, and orders promulgated thereunder, relating to or affecting transportation under the compact and to the persons engaged therein, including those provisions of section 6(e) of the District of Columbia Traffic Act, 1925, as amended by the Act approved February 27, 1931 (46 Stat. 1426; Sec. 40-603(e), D.C. Code, 1951 edition), relating to the powers of the Public Utilities Commission of the District of Columbia and the Joint Board created under such section, is suspended, except as otherwise specified in the compact, to the extent that such laws, rules, regulations, and orders are inconsistent with or in duplication of the provisions of the compact: *Provided,* That upon the termination of the compact, the suspension of such laws, rules, regulations, and orders, if not theretofore repealed, shall terminate and such laws, rules, regulations, and orders shall thereupon again become applicable and legally effective without further legislative or administra-

tive action: *Provided further,* That nothing in this Act or in the compact shall effect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities: *Provided further,* That nothing in this Act or in the compact consented to and approved hereby shall impair or affect the rights, duties, and obligations created by the Act of July 24, 1956 (ch. 669, 70 Stat. 598), granting a franchise to D.C. Transit System, Inc

Consent Legislation, § 6

SEC. 6. Jurisdiction is hereby conferred (1) upon the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the District of Columbia Circuit, respectively, to review orders of the Washington Metropolitan Area Transit Commission as provided by section 17, article XII, title II, of the Washington Metropolitan Area Transit Regulation Compact, and (2) upon the United States district courts to enforce the provisions of said title II as provided in section 18, article XII, title II, of said Compact.

II

Pertinent parts of the acts administered by the Secretary of the Interior in managing the national park system:

1. Section 1 of the Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. § 1:

> There is created in the Department of the Interior a service to be called the National Park Service . . . The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

2. Section 3 of the Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. § 3:

> The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section *** shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings. ***

3. The Act of May 29, 1930, 46 Stat. 482, 483:

> . . . there is hereby authorized to be appropriated the sum of $9,000,000, . . . for acquiring and developing, except as in this section otherwise provided, in accordance with the provisions of the Act of June 6, 1924 [43 Stat. 463, 40 U.S.C. sec. 71 *et seq.*], entitled "An Act providing for a compre-

hensive development of the park and playground system of the National Capital," as amended, such lands in the States of Maryland and Virginia as are necessary and desirable for the park and parkway system of the National Capital in the environs of Washington. Such funds shall be appropriated as required for the expeditious, economical, and efficient development and completion of the following projects:

(a) For the George Washington Memorial Parkway, to include the shores of the Potomac, and adjacent lands, from Mount Vernon to a point above the Great Falls on the Virginia side, except within the city of Alexandria, and from Fort Washington to a similar point above the Great Falls on the Maryland side except within the District of Columbia, and including the protection and preservation of the natural scenery of the Gorge and the Great Falls of the Potomac, the preservation of the historic Patowmack Canal, and the acquisition of that portion of the Chesapeake and Ohio Canal below Point of Rocks, $7,500,000: *Provided*, That the acquisition of any land in the Potomac River Valley for park purposes shall not debar or limit, or abridge its use for such works as Congress may in the future authorize for the improvement and the extension of navigation . . . or for flood control or irrigation or drainage, or for the development of hydroelectric power . . .

4. The Act of August 8, 1953, 67 Stat. 495, 496, 16 U.S.C. § 1c:

(a) The term "National Park System" means all federally owned or controlled lands which are administered under the direction of the Secretary of the Interior in accordance with the provisions of the Act of August 25, 1916 (39 Stat. 535), as amended, and which are grouped into the following descriptive categories: (1) National parks, (2) national monuments, (3) national historical parks, (4) national memorials, (5) national parkways, and (6) national capital parks.

APPENDIX E

REGULATIONS OF THE SECRETARY OF THE INTERIOR ADOPTED ON NOVEMBER 16, 1962 (36 C.F.R. 50.36)

(a) *Operation in park areas prohibited; exceptions.* Commercial vehicles and common carriers, loaded or unloaded, are prohibited on park roads and bridges except on roads designated by order of the Superintendent, or when authorized by official permit in an emergency, or when operated in compliance with paragraphs (b), (c) or (d) of this section.

(b) *George Washington Memorial Parkway; passenger-carrying vehicles; permits; fees.* (1) Taxicabs licensed in the District of Columbia, Maryland, or Virginia, shall be permitted on any portion of the George Washington Memorial Parkway without being required to obtain a permit or make payment of fees.

(2) Passenger-carrying vehicles for hire or compensation, other than taxicabs, having a seating capacity of no more than fourteen (14) passengers, excluding the driver, when engaged in services authorized by concession agreement to be operated from the Washington National Airport and/or Dulles International Airport, shall be permitted on any portion of the George Washington Memorial Parkway in Virginia without being required to obtain a permit or make payment of fees. Such vehicles when operating on a sightseeing basis shall comply with subparagraph (4) of this paragraph.

(3) Passenger-carrying vehicles for hire or compensation, other than those to which subparagraphs (1) and (2) of this paragraph apply, may be permitted on the George Washington Memorial Parkway upon application for, and the granting of a permit by the Regional Director, National Capital Region, National Park Service under the following conditions:

(i) When operating on a regular schedule (a) to provide passenger service on any portion between Mount Vernon and the Arlington Memorial Bridge, (b) to provide limited direct nonstop passenger service from Key Bridge to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return, and (c) to provide limited direct nonstop passenger service from the interchange at Route 123 to a terminus at the Central Intelligence Agency Building at Langley, Virginia, and direct return. Permittees shall file a schedule of operation and all schedule changes with the office of National Capital Region showing the number of such vehicles and total miles to be operated on the parkway.

(ii) When operating nonscheduled direct, nonstop service primarily for the accommodation of air travellers arriving at or leaving from Dulles International Airport or Washington National Airport (a) between Dulles International Airport and a terminal in Washington, D.C., over the George Washington Memorial Parkway between Virginia Route 123 and Key Bridge; (b) between Washington National Airport and a terminal in Washington, D.C., over the George Washington Memorial Parkway between Washington National Airport and 14th Street Bridge; and (c) between Dulles International Airport and Washington National Airport over the George Washington Memorial Parkway between Virginia Route 123 and Washington National Airport. Permittees shall file a report of all operations and total miles operated on the George Washington Memorial Parkway.

(iii) Permits shall be issued, normally for a period of one year effective from July 1 until the following June 30, at the rate of one cent (1¢) per mile for each mile each such vehicle operates upon the parkway. Payment shall be made quarterly within twenty (20) days after the end of the quarter based upon a certification by the operator of the total mileage operated upon the parkway.

(4) Sightseeing passenger-carrying vehicles for hire or compensation other than taxicabs may be permitted on the

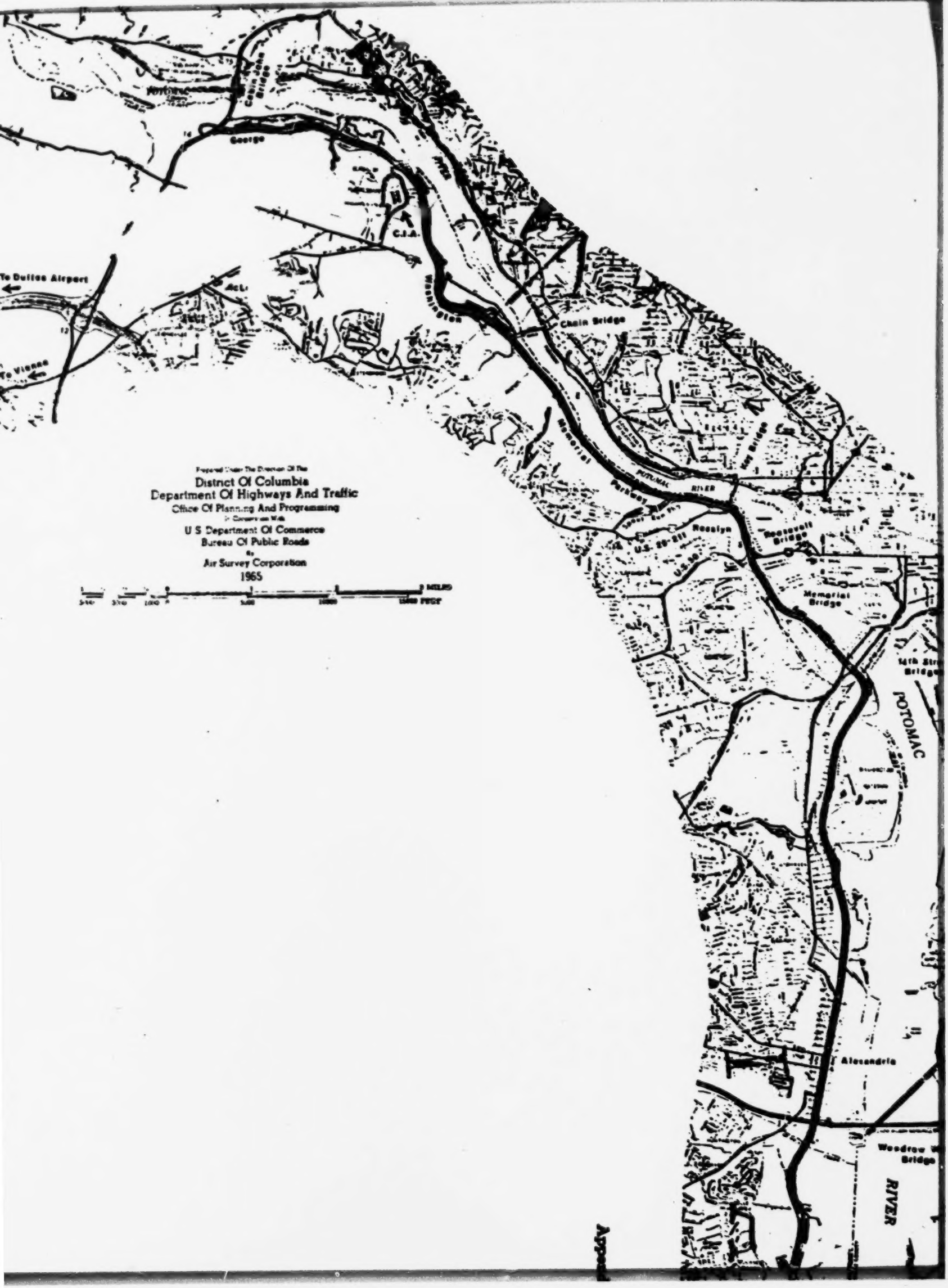
George Washington Memorial Parkway upon application for, and the granting of a permit by the Regional Director, National Capital Region, to provide sightseeing service on any portion of the parkway. Permits may be issued either on an annual basis for a fee of three dollars ($3.00) for each passenger-carrying seat in such vehicles; on a quarterly basis for a fee of seventy-five cents (75¢) per seat; or a daily basis at the rate of one-dollar ($1.00) per vehicle per day.

(c) *Commercial trucks.* The use of any park road by commercial trucks when such trucking is in no way connected with the operation of the park system is prohibited, except (1) on the section of Constitution Avenue east of 19th Street, (2) that in special cases, trucking permits may be issued at the discretion of the Superintendent.

(d) *Taxicabs*—(1) *Operations around memorials.* Parking, except in officially designated taxicab stands, or cruising on the access roads to the Washington Monument, the Lincoln Memorial, the Jefferson Memorial, and the circular roads around the same, of any taxicab or hack without passengers is prohibited. However, this section shall not be construed to prohibit the operation of empty cabs responding to definite calls for hack service by passengers waiting at such Memorials, or of empty cabs which have just discharged passengers at the entrances of the Memorials, when such operation is incidental to the empty cabs leaving the area by the shortest route.

(2) *Stands.* Taxicab stands to serve the public convenience may be established by order of the Superintendent in suitable and convenient places.

(e) The provisions of this section prohibiting commercial trucks and common carriers shall not apply within "other Federal reservations", in the environs of the District of Columbia, as defined in § 50.4(b), and shall not apply on that portion of Suitland Parkway between the intersection with Maryland Route 337 and the end of the Parkway at Maryland Route 4, a length of 0.6 mile.


To Dulles Airport
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George
C.I.A.
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Chain Bridge
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POTOMAC RIVER
Key Bridge
Roosevelt Bridge
Memorial Bridge
14th Street Bridge
Alexandria
Woodrow Wilson Bridge
POTOMAC RIVER
Prepared Under The Direction Of The
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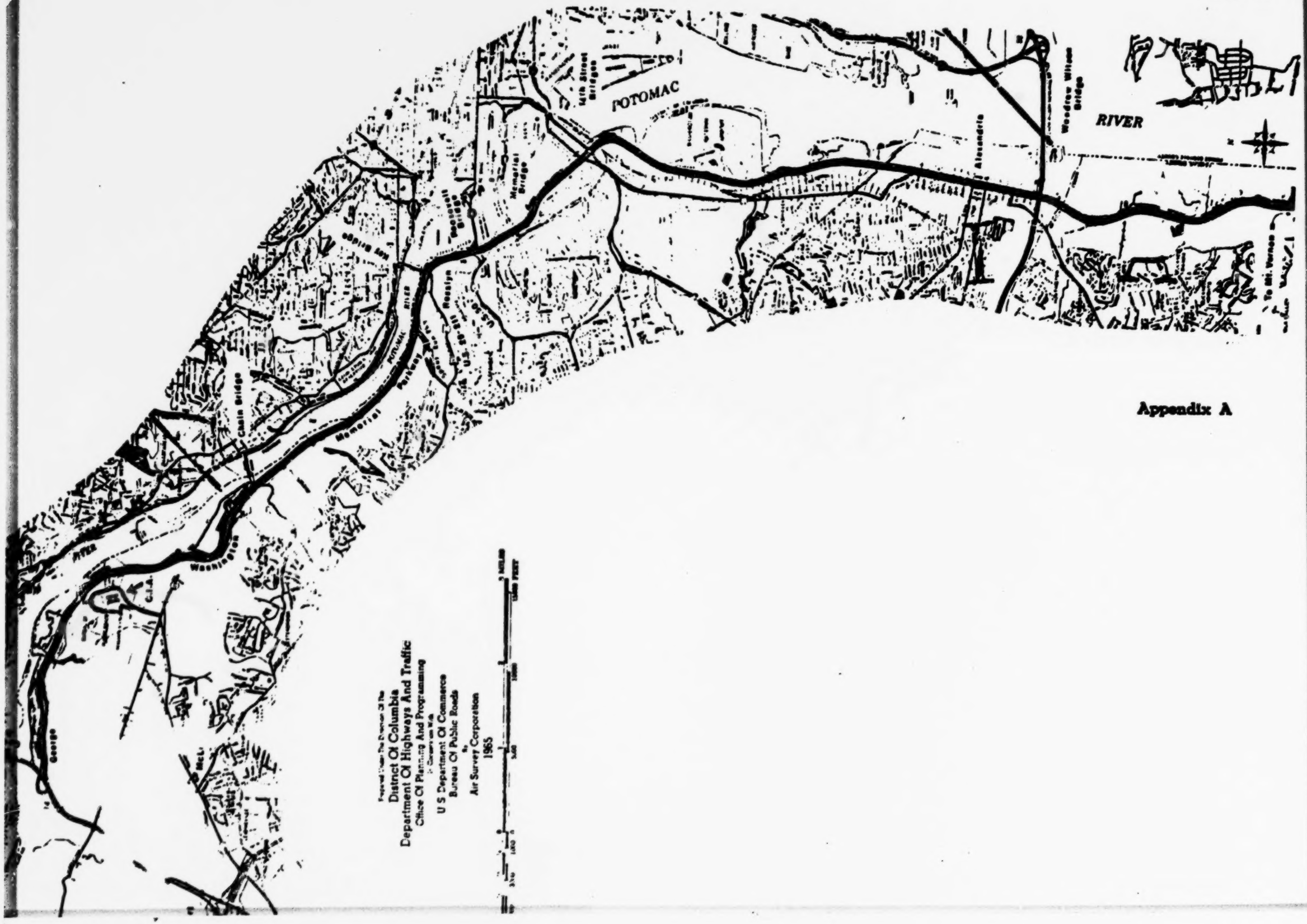
Department Of Highways And Traffic
Office Of Planning And Programming
In Cooperation With
U S Department Of Commerce
Bureau Of Public Roads
By
Air Survey Corporation
1965


POTOMAC
RIVER
Memorial Bridge
Key Bridge
Francis Scott Key Bridge
Memorial Avenue
Parkway
Rosslyn
Arlington
Alexandria
Washington
Cabin John Bridge
Woodrow Wilson Bridge
To Mt. Vernon
Prepared for the District of Columbia
District Of Columbia
Department Of Highways And Traffic
Office Of Planning And Programming
In Cooperation With
U S Department Of Commerce
Bureau Of Public Roads
By
Air Survey Corporation
1965

Appendix A

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 639

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 658

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 398 F.2d 765 (Pet. App. 17–25).[1] The opinion of the district court is reported at 268 F.Supp. 34 (Pet. App. 26–59).

[1] "Pet. App." refers to petition filed in No. 639.

325-967—68

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1968. A timely petition for rehearing *en banc* was denied on August 5, 1968. The petitions for writs of certiorari were filed on October 14 and 16, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether regulations of the Secretary of the Interior, issued in the exercise of his jurisdiction to administer the federally owned George Washington Memorial Parkway, may validly prohibit commuter bus service on a segment of the Parkway, while permitting use of the same segment by buses for government, airport and sightseeing purposes and while allowing commuter buses to use other segments of the Parkway.

STATEMENT

The United States owns a strip of land along the Potomac River in Virginia on which is located the multi-lane highway known as the George Washington Memorial Parkway. The Parkway stretches from Mount Vernon on the south to the City of Alexandria and, commencing again north of Alexandria, continues through Arlington and Fairfax Counties past National Airport, Memorial and Key Bridges to its northern end at the Capital Beltway. The Parkway is administered by the Secretary of the Interior through the National Park Service.

The Secretary has been given authority by Congress to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reserva-

tions under the jurisdiction of the National Park Service * * *." Sec. 3, Act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. 3. The regulations issued by the Secretary, 36 C.F.R. 50.36 (1968 ed.), provide in substance that commercial vehicles, except taxicabs and small airport transport vehicles, are prohibited on the Parkway except when authorized by permit. Between Mount Vernon and Memorial Bridge, commuter buses with a permit are allowed without limit. Between Memorial Bridge and Key Bridge, no buses are allowed. North of Key Bridge, commuter buses are allowed only to proceed to the Central Intelligence Agency with a "direct return," and, similarly, to travel from the interchange at Route 123 to the CIA and return directly. Airport buses with a permit are allowed over a fixed route north of Key Bridge without limit, and sightseeing buses with a permit may use this section of the Parkway without limit.

When Washington, Virginia and Maryland Coach Company refused to obey these regulations after extended negotiations, the United States brought suit to enjoin its use of the Parkway. D.C. Transit System, Inc., the parent corporation, and the Washington Metropolitan Area Transit Commission intervened as defendants. In a separate action, both bus companies and the Commission sued the Secretary to have the regulations declared invalid.

The district court held that the regulations illegally discriminated against commuter buses, in that they permitted unlimited use of the Parkway by such vehicles south of Memorial Bridge, while limiting such use north of Key Bridge, and in that they allowed sightseeing, airport and CIA building buses north of

Key Bridge, while prohibiting general use of this section of the Parkway by commuter buses. The court of appeals reversed, one judge dissenting, finding that the regulations had a reasonable basis on both historic and aesthetic grounds (Pet. App. 24).

ARGUMENT

The proper standard for judicial review of administrative action was here applied by the court of appeals. There is a judicial presumption of validity attaching to administrative action, and the burden is on those challenging such action to overcome that presumption (Pet. App. 23). Where control of the subject matter has been conferred by Congress on a particular official, judicial review of his action within that field is exhausted once it has been found to have a "rational basis." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286–287; see Pet. App. 24. And where there is more than one solution to an administrative problem, the courts will uphold any one that has a rational basis. *Udall* v. *Tallman,* 380 U.S. 1. The task of weighing competing uses of the federal land involved in this case has been delegated by Congress to the Secretary, and his judgment in this regard will not be overturned by the courts unless it is shown to be arbitrary or beyond his authority. *United States* v. *Shimer,* 367 U.S. 374, 381–382; see Pet. App. 23.

Here the Secretary of the Interior is called upon to administer a recreational park drive exploiting the scenery of the Potomac River and to furnish approaches appropriate to entering the Nation's Capital and Mount Vernon. Act of May 29, 1930, 46 Stat. 482.

The Parkway was developed in segments at different times and under varying conditions. Below Memorial Bridge the Parkway connected with the local street system of the adjacent communities. It was developed sometime ago as the first segment of the Parkway and replaced an existing commuter railway. Historically there has never been any limitation on commuter bus service on most of this segment. Above Key Bridge, the Parkway is a limited access highway constructed in part to accommodate CIA personnel.[2] Balancing the competing purposes of providing a scenic highway and accommodating the federal facilities and traditional usage which had been made of the Parkway, the Secretary evolved the regulations upheld by the court of appeals. His determination, as the court below correctly concluded, "has a reasonable basis in the record" (Pet. App. 24).

Moreover, the instant case presents no legal issue of significance beyond its immediate facts.[3] Since the court of appeals correctly applied the well-settled

[2] Petitioners' suggestion that the Secretary is seeking to regulate bus transportation *off* the Parkway by allowing trips only directly to and from the CIA building is inappropriate. The purpose plainly is to limit usage while still accommodating CIA personnel (see Pet. App. 22), and is thus a rational one.

[3] Contrary to petitioners' contention, there was nothing improper in the court of appeals' consideration of the affidavit of the Secretary filed in support of the government's motion for summary judgment (see Pet. App. 21). That affidavit simply provided the court below with an explanation of the reasons underlying the Parkway regulations by the official who had promulgated them—a proper subject of judicial inquiry. That the affidavit was not, as a technical matter, part of the evidence contained in the record is thus hardly controlling.

standard for judicial review of administrative action, there is no occasion for further consideration.[4]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectively submitted.

ERWIN N. GRISWOLD,
Solicitor General.
CLYDE O. MARTZ,
Assistant Attorney General.
ROGER P. MARQUIS,
THOS. L. MCKEVITT,
A. DONALD MILEUR,
Attorneys.

NOVEMBER 1968.

[4] There is no question in this case, as there is in *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Commission*, No. 19, 1968 Term, regarding the authority of that body over national park lands administered by the Secretary. The Commission's argument below was simply that the Secretary's regulations were unreasonable (Pet. App. 20, n. 3).

U.S. GOVERNMENT PRINTING OFFICE: 1968